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THE

Weekly Reporter:

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE CALCUTTA AND MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND.

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(7) —— affirmed by an order of the Privy Council must be executed with the execution of that order, and not as separate decrees ... 301

(8) A Judge acts contrary to law in amending his —— in the absence of a defendant and without previous notice to him ... 349

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See Construction (2) (5)
See Execution (6)
See Full Bench Rulings (1)
See Purchaser (2)

DECREE INTER PARTES.

See Evidence (3)

DECLARATORY DECREE.

(1) Where plaintiffs ask for a declaration of right to remove to their own house, and keep there, for the period of their turn of worship, an idol set up by the common ancestor of the litigants, but whose temple has been destroyed by the erosion of the river, HELD that the Court before making a —— should define the period for which plaintiffs are entitled to worship... 28

(2) A decree declaring the right of plaintiffs to remove to their own house, for the period of their turn of worship, an idol set up by the common ancestor of the litigants, ought also to provide for the reconveyance of the idol to the place where it was, at plaintiffs' expense and before the expiration of their turn ... *ib.*

(3) Where a reversioner failed in a suit to set aside a zur-i-peshgee lease executed more than nine years previously owing to inability to establish his right, the High Court

DECLARATORY DECREE—*(Continued).*

was asked to continue it by remanding it to the lower Court for a——: HELD that it was not a case in which it would be right for the Court to exercise its discretion 32

(4) A Court ought not to make a declaration of right in favor of a party on a state of facts which are not sufficient to enable it to grant relief ... 268

(5) Where N L died, leaving a widow and an adopted son, and on the death of the latter, the widow adopted another son, and N L's brother sued to have the adoption declared invalid, and to have his reversionary right declared, the Court refused to make the declaration ... 419

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See Dower (2)
See Full Bench Rulings (5)
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A Judge ought not to deal with a case on —— not forming part of the record ... 299

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(2) Where, in a suit by the widow of F, brought against F's heir-at-law for deferred ——, it is found that no portion of F's estate has come into defendant's hands: HELD that, whether the property was in the hands of the plaintiff herself, or of a third party, a suit for a declaration of right would be premature ... 268

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(1) A zemindar, who admits that defendant has been his tenant, cannot succeed in a suit for ——, except on the ground that the period of tenancy has elapsed, or in some way terminated ... 215

(2) The liability to —— of the holder of a mokurruree istemraree ijara is to be determined by the conditions of his lease, and not by the provisions of Act X. of 1859, s. 21 349

(3) Plaintiff's ancestor purchased a property sold in execution of a decree against R C and R L, obtained by B L in 1848, and takes possession. In 1861 K R sued R C's representatives on a mortgage-bond, and obtained a decree against the defendants personally, which did not direct the sale of the mortgaged property. In 1868, K R in execution sold the right, title, and interest of her judgment-debtors to defendants, who paid the consideration-money, and obtained possession. Plaintiff now sues for ——: HELD that defendants are entitled to stand in K R's shoes as an incumbrancer, so far as their money has gone to pay off the charge K R had on the land; and that the suit must be taken to be a redemption-suit, and the plaintiff ought not to recover the property without paying to defendants as much as may appear due to them ... 422

See Enhancement (4)

ENHANCEMENT.

(1) Where a suit for —— is decided against plaintiff upon a question of a mokurruree, plaintiff cannot afterwards in special appeal take advantage of the regular proof of tender to have the suit dismissed 93

(2) A landlord may bring his suit for —— whenever he pleases: it is for the tenant to prove his right to hold at a fixed rate ... 196

ENHANCEMENT—*(Continued).*

(3) In a suit to set aside notice of —— when plaintiffs put in documents showing that they have long held at existing rates, and there is no evidence that the land has not been held at uniform rates from the Permanent Settlement, they are entitled to presumption prescribed by Act VIII. (B.C.) of 1869, s. 4 ... 205

(4) A tenant in possession under a pottah and after execution of a kubooleut, is entitled to the usual notice before eviction or enhancement by a decree of Court. He is not liable to —— or eviction in a suit against a third party where he is merely made a defendant ... 347

See Act X. of 1859 (1)
See Notice (3)
See Privy Council Appeals (12) (15) (23)
See Regulation VIII. of 1793 (1)

EQUITABLE RELIEF.

Where a putnee lease of certain properties was to be executed in plaintiffs' favor in case certain money borrowed from him was not repaid by a given date, the money in that case being considered as a *bonus* for the lease; and where the deed embodying this stipulation was to be counted as a putnee pottah if the lease was not executed, HELD that the plaintiff is entitled to relief even though he may ask for something he is not strictly entitled to; and if the bonus is inadequate, the Court may equitably relieve defendant on payment of the original sum with interest from the date of advance ... 274

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EVIDENCE.

(1) An attested copy of a petition is admitted as —— when the original is with the record of a different case, and application has been made for it ... 85

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(2) In a suit for ejectment, HELD that the admission in appeal of a pottah on the *ipse dixit* of the defendant after his vakeel had deposed on oath in the first Court that defendant had no documents whatever, is a substantial error in law; and that even if the Subordinate Judge had a right to admit it, he was wrong in deciding the case on it without —— of its genuineness ... 88

(3) A decree in a matter of a mortgage between B and another of the defendants in a suit to which neither the plaintiff nor any one privy to him in title was a party, is not admissible in —— as a decision *inter partes* ... 156

(4) Where neither the opposite party nor the witnesses can state whether certain land belongs to R or to C; R, who is in possession of the title-deeds and receipts of rent, ought to succeed, unless something on the record counteracts the —— ... 162

(5) A defendant may insist that the plaintiff shall prove his right by the best available ——, *e.g.*, a ticca lease on which the claim is alleged to depend entirely ... 210

(6) The business of a Court having to deal with facts is to take up the evidence not *seriatim*, but in all its parts, to consider the bearing of the parts to one another, and to see whether as a whole a case has not been made out ... 213

(7) In a suit to hold lands on a mokurruree tenure, the Judge gives undue importance to the omission by plaintiff when giving —— in a former suit between third parties to mention the mokurruree, where the circumstances did not call for such mention ... 217

(8) Where the best —— is not given, and the opposite party does not object to the secondary —— put in, the decree must stand on such —— as is before the Court ... 248

(9) A decision set aside by a superior Court as made without jurisdiction has no probative force between the parties ... 283

(10) Chittas and maps made in contemplation of resumption-proceedings in the presence of both sides, and signed by the parties are legal — 309

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EXCESS LAND.

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(1) Where a decree awards a certain sum calculated in the schedule *plus* costs and interest, the Court executing commits an error in altering the amount by reducing the rate of interest during the pendency of the suit ... 46

(2) An order to an Ameen to give possession to decree-holder of such of the moveable properties mentioned in the schedule as he can find, and to enquire into the nature, amount, and value of such as he cannot find, is not necessarily construed as giving alternative damages. The inquiry is necessary to guide the Court in the exercise of its discretion under Act VIII. of 1859, s. 200 ... 82

(3) Where a bond-holder in his —— proceedings refers to his *kistbundee* as well as his decrees, and irregularly includes in the amount to be levied what was not given by the decrees, if the proceeds do not cover the decrees, the proceedings are not void, nor is the plaintiff's purchase a nullity ... 83

(4) An agreement between decree-holders and judgment-debtors after partial —— cannot be set aside on the application of the judgment-creditors on the ground that it exposes them to the risk of certain consequences ... 155

(5) Where it isordered in —— that a decree-holder shall get possession of a specified plot, HELD that so long as any portion of it remains, he cannot touch the remaining plots ... 161

(6) The —— of an imperfect decree does not involve what is unlawful or the doing of a wrong, unless the decree is incorrectly interpreted ... 188

(7) Where a decree-holder having delayed to find security, the lands decreed are attached and sold under a judgment obtained by others who purchase and enter on possession; and plaintiff bringing another suit obtains a decree for possession, HELD that this decree is only intended to confirm her in the position she occupied when the property was sold in —— of her original decree; and where a putnee right had been proclaimed at the time of the original sale, plaintiff is not entitled to *khas* possession ... 219

(8) Where an —— sale is postponed for short periods at the request of the judgment-debtor, on the understanding that the attachment and proclamation are to subsist, no fresh proclamation is necessary ... 227

(9) Where plaintiff obtains a decree for declaration of right and recovery of possession of a jote sold in —— for arrears of rent due from the former owner, and the Subordinate Judge in appeal reverses the decree on the ground that the plaintiff not having deposited the rent claimed and given security had no *locus standi*, HELD that there is no authority or countenance for this in the law ... 230

(10) Neither a bond pledging certain property as security after a decree has been given to plaintiff on a prior mortgage-bond, and the mortgaged property has been ordered to be sold, nor a conveyance by the judgment-debtors subsequently to plaintiff's petition for a sale of the property, can create a new ownership in third persons. The proceedings of the Moonsiff upholding the objection of one of the third parties brings about an inoperative sale, and plaintiff is entitled to a refund of his consideration-money ... 289

(11) Where a zemindar in possession puts in a claim to a tenure put up for sale in —— of a decree against a party alleging a mokurruree title, and notice of the claim is ordered to be given at the time of the sale, the zemindar need not sue to set aside the sale, or for any other purpose. Nor can limitation run against him in favor of the purchaser who does not get possession ... 298

(12) Where the facts connected with an —— sale do not show fraud, but only irregularity, the judgment-debtor's remedy lies in an application under s. 256, Act VIII. of 1859: such application failing, he cannot resort to a regular suit on the same grounds ... 414

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(13) Plaintiff cannot in justice seek to recover property purchased by defendants at an execution-sale, without offering to pay them the debt which he owes them, and which formed part of the consideration-money ... 416

(14) The time spent by a decree-holder to whom a balance remains due under the decree, in defending a suit brought against him by a third party to establish his right to property purchased by the decree-holder in execution, HELD to be time spent in *bonâ fide* carrying on —— ... 417

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A defendant allowing an —— to be passed against him cannot afterwards object to the decree as no evidence ... 213

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In a suit to foreclose a mortgage brought against the Court of Wards as guardian of an idiot, HELD that, if the lunatic is not the owner, the suit is worthless for the purpose of foreclosing the equity of redemption of the real owner, who is no party to the suit ... 163

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FORGERY.

(1) A Judge should not give his sanction to a prosecution for —— before all the testimony is heard and a *primâ-facie* case made out 183

(2) *Quære.*—Is the Judge's sanction necessary to the prosecution for —— of a petitioner filing a certain document? ... *ib.*

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Defendant is at liberty to show the real circumstances under which an agreement was entered upon, although it was entered upon by plaintiff and defendant's ancestor in furtherance of a —— ... 138

See Conveyance (1)
See Omission of Parties (1)

FRAUDULENT TRANSFER.

A party succeeding to the possession of property cannot ask the assistance of the Court to rectify a —— effected by his predecessor, or to ask that these documents should be treated as void at law ... 270

FRESH TRIAL.

See Decree (5)

FULL BENCH RULINGS.

(1) A decree against one person for the rent of one period, and against another for the rent of another period, is, in fact, two decrees, *i. e.*, a separate decree against each for the sum for which he is liable. In such a case, the decree is to be kept in force against each, and the proceedings in execution against one of the defendants are not sufficient to prevent the law of limitation applying to the other defendant ... 30

(2) Where adjournments are made by a Court in order to give effect to its processes for compelling the attendance of the witnesses, being thus made as much on its own motion at the instance of the defendant as at the instance of the plaintiff, the case cannot be said to come under Act VIII. of 1859, s. 148, which contemplates a case where a party has obtained time to produce his witnesses, and has failed to do so ... 35

(3) The age of majority of a Hindoo resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil, is the end of 15 years ... 110

(4) In regard to a will which was not to be construed according to English law, but according to equity and good conscience, the rule of interpretation was held to be that, unless a contrary intention appeared, the estate given should be considered an absolute one. The words, "on his [devisee's] demise his sons shall get," were held only to describe what the

FULL BENCH RULINGS—*(Continued)*.

testator thought would really follow from what he had done, and as not affecting the absolute character of the gift ... 181

(5) The holder of a decree which declares that the boundary line laid down in the survey-map as the boundary line of the plaintiff's permanently-settled estate is not the true boundary line, is not entitled either to have the decree proclaimed on the spot, or to have the line erased from the survey-map ... 232

(6) The words in Act X. of 1859 s. 56, as to a summons or proclamation having been "duly served according to the provisions of this Act," refer to the mode of service, and not to the agency by which it is effected, and the fact that the summons was not served through the Collector of the district, but by an officer of the Court itself, would be no ground for not proceeding with the case if the summons had been served in the manner the Act (s. 45) requires.

An irregularity of this kind by which the party is not injured does not vitiate the proceedings, or render the *ex-parte* decree void; and even if the decree in such a case is set aside, the sale held in execution of it does not thereby fall to the ground.

Quære.—Is the Civil Court (including also the Court of the Moonsiff) competent to inquire into the regularity of decrees obtained in the Revenue Court, and either set them aside or treat them as nullities on the ground of greater or less irregularities in the proceedings? ... 234

(7) Bakir Ali brought a suit against his landlord in the Deputy Collector's Court, under Act X. of 1859, s. 23, cl. 6, for the recovery of possession of lands, claiming to hold the land under a mowrussee pottah. The landlord impugned the pottah as spurious, and upon trial the pottah was found to be genuine, and Bakir Ali got a decree.

The landlord now brings a civil suit to eject the heirs of Bakir Ali from the same lands.

The question referred to the Full Bench is whether the previous decision as to the pottah is not conclusive between the parties.

FULL BENCH RULINGS—*(Continued)*.

The Full Bench answered the question in the negative ... 322

(8) In order to realize the amount of his decree against R, S caused the rights and interests of R in certain surplus-proceeds of property sold for arrears of Government revenue (which surplus was in deposit with the Collector) to be attached and sold. Plaintiffs purchased the rights and interests in question for Rs. 8,000. This money they put into Court, and it was taken out by S and others in satisfaction of decrees against R. On plaintiffs' applying for R's share in the surplus, they learnt that the sale for arrears of revenue had been set aside. They then sued for refund of the purchase-money with interest:

HELD that the rule applicable to this case was that which is applied by Courts of Equity where vitiated sales are set aside, *viz.*, that, as the transaction ought never to have taken place, so the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction, and that the purchaser was in the situation of a mortgagee so far as he had made payments in consequence of the sale, and was entitled to recover his claim with interest.

It was also declared that, in the event of an appeal to the Privy Council against the order setting aside the Government sale proving successful, plaintiff would not have any rights in consequence.

Obiter dicta.—The plaintiffs ought to have been made parties to the suit for setting aside the Government sale.

The rule stated in Addison on Contracts as to "voluntary payments" would not apply to this case; plaintiff's payment having been not voluntary, but on account of the purchase ... 351

(9) HELD (by Couch, C.J., and Jackson, Phear, Macpherson, Markby, Ainslie, and Pontifex, JJ.) that, under the Hindoo law, as administered in the Bengal school, a widow who has once inherited the estate of her deceased husband is not liable to forfeit that estate by reason of unchastity... 367

(10) In a suit to recover possession of property which was purchased by

FULL BENCH RULINGS—*(Continued)*.

one party in the name of another, the real purchaser ought, by the rule of Courts of Equity, to be a co-plaintiff. Where this is not the case, a decree obtained by the plaintiff may be reversed on appeal, as the real purchaser not having been a party would not be bound by such decree.

Where an estate which is entered on the *towjee* of the Collectorate of a district consists of villages of which only the greater number are situated within that district, it may, for the purposes of attachment and sale in execution of a decree, be considered as wholly situated in that district, and be so dealt with by the District Court.

Where a decree has been executed by a Court other than that by which it was passed, the title of the purchaser may not be avoided by showing that there was property of the judgment-debtor within the jurisdiction of the Court that passed the decree which might have been attached and sold. Strictly speaking, until the latter property was sold, the certificate, under Act VIII. of 1859, s. 286, should not have been granted; but the error, though ground for an appeal, does not make void the certificate ... 434

G.

GIFT.

See Original Jurisdiction (2)

GUARDIAN.

(1) A Court in appointing a —— or manager for a lunatic is bound to appoint the fittest person from among relatives, the father being legal ——, and in default the mother, and so on ... 163

(2) Since the passing of Act XXXV. of 1858, a —— or manager of a lunatic's estate cannot be properly appointed otherwise than as there prescribed; and no *de facto* manager can have more power of aliening and encumbering than a *de jure* manager would have ... *ib.*

(3) Where plaintiff in less than two years after affixing her signature to a lease to defendant of certain land belonging to her infant son for which she had previously given a mokurruree lease to a co-sharer, who then leased it to defendant sues for possession, the proper course is to refuse to let her carry on the suit on behalf of the infant, but treating as a suit on her own account to dismiss it with costs; leaving the minor to sue through some other person as his next friend .. 233

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H.

HIGH COURT POWERS.

(1) The High Court declined to interfere on behalf of a party complaining that the District Judge had acted *ultra vires* in dismissing him from the post of serishtadar of the Moonsiff's Court on the ground that the applicant was open to seek his remedy from the Local Government ... 148

(2) The powers conferred by 24 and 25 Vict., cap. 104, s. 15, and Act XI. of 1865 do not enable the High Court to interfere with the decision of a Small Cause Court refusing defendant's application to send for a letter filed in another suit ... 306

HIGH COURT RULES.

Under the ——, account-books not translated, and not, therefore, a part of the paper-book, cannot be referred to in a trial without special leave ... 121

HINDOO LAW.

(1) A Hindoo lunatic may have property, even though he is not capable of inheriting while a lunatic, but he cannot make valid contracts binding on himself or his property. All dealings with his property must be made by a guardian or manager appointed by the supreme civil power ... 163

(2) Property purchased by a member of an undivided family with money exclusively his own is his separate acquisition ... 223

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A —— may properly alienate a moderate portion of her deceased husband's property for the purpose of performing his shradh at Gya; but she is not justified in disposing of the entire property for this purpose ... 426

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See Full Bench Rulings (9)
See Joint Hindoo Family (4)
See Legal Necessity (1)
See Original Jurisdiction (2)

HOONDEE.

Where in a suit on a ——, the first defendant denies having executed the document, and the second defendant admits his endorsement, but says he has made it by way of surety for the first, HELD that the lower Court should try whether the signatures are genuine, and should distinguish the cases, and try them separately ... 304

I.

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See Act VIII. of 1859 (2)
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(1) Where the rate of —— on a sum decreed is not specified, the Court is not wrong in estimating the —— at a rate which it thinks reasonable ... 46

(2) In the absence of any contract to pay ——, the Court may give or withhold it; and it does right in withholding it where the claimant for contribution sleeps over his rights for a long time ... 98

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In a rent-suit against a tenant by a landlord, a person preferring opposing claims to the plaintiff should not be put on the record, unless his position would be seriously compromised by a decree in plaintiff's favor ... 248

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IRREGULARITY.

No —— in conducting a sale, however material, can vitiate the sale unless it entails substantial injury to the party seeking to set it aside 78

See Execution (12)
See Sale (5)

ISSUES.

(1) Where the dispute is whether certain land held by plaintiff is what he is entitled to hold as lakheraj under a sunnud whose genuineness is not questioned, HELD that the Lower Appellate Court is wrong in pronouncing the sunnud not genuine, its genuineness being in no way in issue. The case should be remanded ... 267

(2) Where plaintiff sued to recover possession of premises alleged to have been sold to him by defendant under a deed which the latter denied, and the first Court, though satisfied of the fact of execution, had doubt as to the nature of the transaction, HELD that the first Court ought to have framed an issue as to the nature of the transaction, and the Lower Appellate Court rightly dismissed the suit, because plaintiff had not foreclosed the mortgage ... 333

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(1) Where certain co-sharers sue collectively a number of defendants who are partly shareholders, and partly vendees, it cannot be objected in special appeal that the decision, though correct on the whole, is unjust to certain of the plaintiffs ... 300

(2) Two causes of action, one as purchaser of arrears of rent, and the other for rent due, are properly joined in one suit cognizable by the Civil Court, without any such distinction as that of different sides of the Court; the case to be decided according to the law of limitation or other law applicable to the different parts of the claim ... 431

JOINT DECREE.

(1) Where a defendant in a suit for possession is charged with having jointly with others ousted plaintiff, and does not choose to deny the ouster, his subsequent plea, that he had not been in possession, cannot be listened to, and he is liable under the —— ... 96

(2) Where one person of several entitled to the benefit of a decree seeks to have it executed, without joining the others, he must apply under s. 207, Civil Procedure Code ... 302

JOINT HINDOO FAMILY.

(1) Every Hindoo family is presumably joint in food, worship, and estate; and the presumption is that it remains undivided ... 178

(2) Where a member of a Hindoo family presumed to be joint is in possession of any property, he is presumed to hold it as a member of a ——. The person setting up a different state of things must meet this presumption ... *ib.*

(3) Members of a —— on joint premises may, on the occurrence of a dispute, ask to have their proper share assigned. The fact of not being in possession of a particular portion of the premises is no bar to a claim for such portion ... 189

(4) There is no ground for excluding a Hindoo widow from a share in joint premises, inasmuch as she may re-marry and have issue ... *ib.*

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JOINT PROPERTY.

(1) Where plaintiff is excluded from the ijmalee enjoyment of land by the joint action of defendants who have divided the property between themselves, none of them can restrict their liability for mesne-profits to that portion only of which they were in possession 218

(2) Property purchased by a member of a joint family with money out of the common estate is ——, though purchased in the name of his son. And though the son is a certified purchaser under Act I. of 1845, the other members of the family are not debarred by s. 21 from claiming a share ... 223

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See Onus Probandi (3)
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See Act X. of 1859 (2)

JURISDICTION.

(1) Of the Small Cause Court at Calcutta, in a case in which plaintiff, in order to give it ——, claims as damages sums which by law he cannot recover, and adds them to his claim for that purpose 20

(2) Where, in a suit in a British Court in Burmah to recover possession of timber taken without color of right, and in collusion with a Burmese Governor, in defence an act of state is set up, and it is contended that the person through whom defendant took possession being a foreign local authority, a Court of British India is not entitled to enquire into the character of the act ... 123

(3) When an *ex-parte* decree in a suit for arrears of rent instituted before Act VIII. (B.C.) of 1869 is transferred under Act III. (B.C.) of 1870 to a Moonsiff's Court for execution, an application for rehearing lies to the Deputy Collector's Court ... 128

(4) As to the application of Act III. (B.C.) of 1870 to set aside an *ex-parte* decree for arrears of rent passed by a Deputy Collector, and partially satisfied by attachment and sale of lessee's property; and where the sureties, on his death, object to the decree on the ground that summons has not been served on them ... 129

(5) Where a question, such as is contemplated in Act XXIII. of 1861, s. 11, is determined by the order of a Subordinate Judge engaged in executing a decree, the appeal lies to the District Judge, and not to the High Court, although the original subject-matter has grown to a sum exceeding Rs. 5,000 ... 131

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HELD that it must be assumed that the will was explained to the testator, and that he understood its meaning, otherwise there would be no question of construction:

HELD that the testator intended his wife to be something more than a trustee or manager for the infant heirs, and that she took absolutely all the property of the testator. There need not be an express declaration of a desire or intention to disinherit sons, if there is an actual gift to some other person ... 48
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PRIVY COUNCIL RULINGS.

(1) Where a plaintiff sues for confirmation of possession, and seeks a declaratory decree, he must make out his title affirmatively. If the Indian Courts agree in holding that he has not done so, even though the High Court may not have attended to the depositions of material witnesses, the Judicial Committee will not disturb the decision of the High Courts ... 1

PRIVY COUNCIL RULINGS—*(Continued).*

(2) The bar of limitation applicable to an action for rent brought in the Collector's Court under Act X. of 1859 is that provided by s. 32 of the same Act, and not that provided by Act XIV. of 1859, the special legislation contained in the rent law not being repealed by the general law of limitation, either by express words or necessary implication ... 5

(3) A settlement of an estate made at the time of the perpetual settlement would not, of itself, operate to destroy a family-usage regulating the manner of descent, either in the case of a well-established raj, or even where the origin could not be shown.

In point of law, a manner of usage of descent of an ordinary estate may be discontinued so as to let in the ordinary law of succession; such family-usages being in their nature different from a territorial custom which is the *lex loci* binding all persons within which it prevails. It is of the essence of family-usages that they should be certain, invariable, and continuous; and well-established discontinuance must be held to destroy them ... 8

(4) As a man cannot, while he has an adopted son living, adopt another son; so neither can his widow, after his death, by virtue of any authority delegated from him, adopt a son while an adopted son is still living.

Defendants who have represented the fact of an adoption which they erroneously conclude to be an adoption valid in law cannot be charged with misrepresentation so far as the fact is concerned, and are not estopped from setting up the true facts of the case.

Even if a plaintiff has been misled, by various representations of the defendant, into framing his suit in a particular way, still he can only recover according to his allegations and proofs, and cannot be allowed to set up an entirely new case not set up or hinted at in the plaint ... 12

(5) On a question of construction of an order of Her Majesty, the words "the plaintiff is to have judgment for his moiety, with interest at the full legal rate and the costs of the proceedings in the Court below" were held as intended to give a plaintiff the moiety claimed by him of the sum which he alleged to be due for principal and arrears of interest (at 12 per cent.) equal to the principal upon a certain kurrarnama and bond, and to allow the interest from the date of the institution of the suit up to realization:

HELD further that, in the account taken by appellant as the foundation for his proceeding in execution, he was not warranted in making a rest at the date of the order of the Principal Sudder Ameen dismissing the suit, and assuming that interest should run upon the consolidated sum from that date; as in the absence of special directions, it could not be presumed that the Appellate Court intended to make an order *nunc pro tunc* which would give compound interest from the date of the decree of the Court of first instance ... 41

(6) Agents buying indigo seed in a rising market under an order to purchase on the most favorable terms cannot experiment by sowing a sample, and waiting before they purchase to see whether it will germinate. They are only bound to act to the best of their judgment, and to use proper care and skill as agents in purchasing what they are ordered to purchase, and their action cannot be repudiated, unless they are shown to have been guilty of negligence ... 65

(7) Of an estate left by H M, his son's widow, R D, became the rightful owner of a moiety, and his daughter's husband, S C H, to the remaining moiety. S conveyed to plaintiff (B C B) by a deed of gift two annas out of his eight-anna share. S, within the period of limitation, commenced a suit against the Ms for the whole of H M's estate; but pending the suit, J was substituted as plaintiff under a deed of sale from S to him, and obtained a decree for an eight-anna share. One of the defendants (R D) appealed against the decree, and had it modified against her to a five anna share. The Ms did not appeal, and the decree remained against them for 8 annas. J executed the decree for five annas. In another suit B C B's title to two annas under the deed of gifts from S was established

PRIVY COUNCIL RULINGS—*(Continued)*.

against J, who afterwards sold to the Ms the 5 annas which he had obtained, and all his right, title, and interest under the decree. The Ms thus got possession of the two-anna share which J ought to have held in trust for plaintiff:

HELD that plaintiff's cause of action for the recovery of his two-anna share arose at a period subsequent to the execution of the decree by J, which was within the period of limitation ... 101

(8) Appellant sued to recover a tract of chur-land as parcel of his mouzah of Jogdash, defendant alleging the said land to be a parcel of his mouzah Ghoogoomaree. About the year 1830, a large tract of land was diluviated by the river Chutol within the mouzahs belonging respectively to plaintiff and defendant; and after re-formation in 1837, a proceeding was taken by the plaintiff before the Magistrate under which he was ordered to be put in possession of a considerable tract of such newly-formed land, the Magistrate laying down the boundaries. After nearly 12 years (*i.e.*, in 1849), respondent's father brought a civil suit to set aside the Magistrate's decision, and the ultimate finding was that appellant had been in possession of the land described in the Magistrate's order from and since the date of that order:

HELD that that decree must be taken to have established that the plaintiff was in possession of the land described in the Magistrate's order, and had continued in such possession; the question in the present suit being whether the lands now claimed are identical with those so described:

HELD that that issue lay upon the plaintiff, because the foundation of his suit was that, having been in possession, he was dispossessed as a consequence of certain measurements made by Government officers:

HELD that plaintiff had failed to sustain the burden of proof. He relied principally on the boundaries given by the Magistrate, and certain maps prepared then and later as compared with the Government map of 1853; but the Privy Council were unable to place firm reliance upon any inference drawn from these maps. The Privy Council were also of opinion that, in questions of this kind, where the natural boundaries and landmarks have disappeared, evidence of possession was very important and satisfactory, and that there was no reason to distrust the witnesses of the respondent proving such possession ... 114

(9) In a suit to recover possession with mesne-profits, of property alleged to have been purchased by plaintiff from one A, where defendant U was a daughter of A's sister R, who claimed the property through her son V, the question was whether plaintiff had obtained the property by a valid deed of sale.

Plaintiff was a pleader, and while a suit was in progress in which on behalf of his step-mother and another client, he contended that V had no property at all in the mouzah, he obtained a conveyance from A, whose sole title was derived from V, which conveyance nominally made to S T was never asserted by plaintiff till seven years later, when he commenced this suit. The evidence for the payment by plaintiff of the consideration-money was so unsatisfactory that the High Court summoned the plaintiff, and examined him:

HELD that it was somewhat dangerous to allow plaintiff, a professional man, who did not give evidence in his own suit in his own behalf, to be called for the purpose of supporting his case which had broken down; that plaintiff's evidence as to payment of the consideration-money was very unsatisfactory and at variance with his previous deposition; and that, though the mere *factum* of the deed was proved, it was not a *bonâ-fide* conveyance:

HELD that the circumstance of U having in a previous suit admitted the execution of the deed, did not preclude her from contesting its validity, and maintaining that it was colorable, not real ... 118

(10) Plaintiff sued defendant for himself and as guardian of his minor son (N) to set aside two deeds relating to the adoption of the said minor, and alleged to be the one an agreement to give, and the other an agreement to take, the child into adoption:

PRIVY COUNCIL RULINGS—*(Continued)*.

HELD that the deeds in form were not mere agreements to *give and take*, but deeds of gift and adoption, and that interchange was not necessary or important:

HELD that, if the defendant gave, or was willing to give, the child, the plaintiff had no right to sue for a declaratory decree on the ground that the deeds were null and void, because of the non-performance of certain religious ceremonies:

HELD that the most important issue in the cause was whether there was an actual delivery of the child, but that, as the Lower Appellate Court did not try that issue, the High Court was in error in deciding the case in special appeal upon that issue:

HELD that the deeds were not actually necessary to render the adoption valid; and if they were set aside, it might be proved *aliunde*.

The breach of an agreement by one of the parties is a ground for an action for damages, or for specific performance, but not a ground for setting aside the contract, or declaring it null and void.

A declaratory decree is not a matter of absolute right, but may be granted or not at the discretion of the Court ... 133

(11) In a suit to recover possession of certain lands upon the ground that they were granted as a jageer tenure by plaintiff's ancestor to one P and his lineal descendants, and that such descendant had failed:

HELD that it was necessary for plaintiff to prove the grant alleged in his plaint, without which no cause of action would have been shown; and as the tenure was created in the usual and proper manner, *i.e.*, by pottah and kubooleut, the latter would be in possession of plaintiff's ancestors. As this was not produced, no secondary evidence given of it, and no foundation laid for giving such evidence, it was unnecessary to go further into plaintiff's case ... 140

(12) In a suit for arrears of rent in pursuance of a notice of enhancement, where it was admitted that defendant was entitled to a perpetual right of occupancy so long as he paid the proper rent, and also that he was a middleman, and not a cultivator; and it appeared from the kubooleut that a howaldaree amulnama had been granted at defendant's request, without any rent for the first year, at varying rates less than Rs. 5 a kanee up to 1264, and at the fixed rate of Rs. 5 per kanee in and after that year:

HELD that it could not have been intended that Rs. 5 should be the rent for that year only, but that the more reasonable construction was that that was to be the rent per annum during the remainder of the holding, and that consequently the rent was not liable to enhancement beyond Rs. 5 a kanee:

HELD that defendant might be liable under Regulation XI. of 1825, s. 4, cl. 1, but not in this suit, which was under Act X. of 1859, s. 17. If liable to enhancement at all, his rent could only be enhanced according to the pergunnah-rate payable by similar holders.

A suit to enhance being very different from a suit to recover arrears of rent at the rate originally fixed, HELD that plaintiff was not entitled to a decree in this suit for the rent of 1272 at the rate fixed in the kubooleut ... 141

(13) In a suit to recover the balance of purchase-money alleged to have been due upon the sale of a decree, where plaintiff's case was that the consideration-money was not paid, but a rooqua given for it payable when the mutation of names took place:

HELD that the *onus* of proving non-payment was thrown upon plaintiff in consequence of the acknowledgments she had made of the receipt of the whole purchase-money, *viz.*, an admission which was made and recorded under Act XX. of 1866, at the time when the deed was registered, and again an acknowledgment made in the petition presented to the Court which made the decree for mutation of names.

Although, when a deed of sale containing an acknowledgment of payment is written, payment is not made, it may become an acknowledgment afterwards, *i. e.*, when the deed is handed over ... 149

(14) A sharer (K) in a zemindaree having been unsuccessful in

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proceeding against the holder of a sub-tenure to enhance its rent, and doubt having been thrown on his zemindaree title, brought a suit to establish his right of enhancement. The holders of the tenure contended that, even if the zemindaree right had passed to him by purchase, he had never received rents, and his claim was barred by limitation. And with reference to a compromise, under which, at the close of a former litigation, a certain sum had been paid to (K) as mesne-profits, it was argued that the last item of the rent of the sub-tenure, entering into that sum, must have accrued more than 12 years previously:

HELD that the payment of the sum within the 12 years was evidence of a recognition of title sufficient to exclude the notion of an adverse possession for more than 12 years:

HELD that the High Court had exercised a sound discretion in entertaining a suit for a declaratory decree where a zemindar, who in a suit for enhancement had had his zemindaree right denied, came into Court to have that right ascertained and declared:

HELD, with reference to s. 15, Code of Civil Procedure, that, where a declaratory decree is sought without consequential relief in the same suit, the Court must see that the declaration of right may be the foundation of relief somewhere, and that that condition was sufficiently met in the present case 171

(15) In a suit for enhancement of rent of an intermediate tenure, where the defence was that the land had been held at a uniform rent from the decennial settlement, and the defendant, seeking to avail himself of the presumption in Act X. of 1859, ss. 15 and 16, proved that the rent had not been changed for 20 years before the commencement of the suit, and thereby threw upon the plaintiff the burden of showing that the rent had been fixed at some later period than the decennial settlement:

HELD that the plaintiff had succeeded in proving that which was cast upon him to prove, *viz.*, by producing a decree declaring his right to enhance, which had been passed in suit brought by him against defendant's father under whom defendant claimed:

HELD also (the Privy Council adopting a decision of the High Court) that, in a suit for arrears of rent at enhanced rates when the liability of the tenure to enhancement has been put in issue, and fully tried, a decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved ... 175

(16) In a suit for an injunction to restrain defendants from proceeding with a building, and to have a portion of it taken down, which had the effect of obstructing light to which plaintiffs were entitled through their windows (the English law before the passing of the Prescription Act, the 2nd & 3rd William IV., c. 71, being applicable, and plaintiffs being required to show an uninterrupted user of at least 20 years with the acquiescence of the defendants):

HELD that, as the building was commenced, and commenced with the manifest intention of being erected as an obstruction before the expiration of the 20 years, the plaintiffs had not established their case.

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(17) Whatever the words "mafee-birt tenure" may have imported originally, the *primâ-facie* meaning of the words has come to be a hereditary tenure.

Where ancestral property has apparently descended in the ordinary way of Hindoo property, first to the son, and thence to the mother, it lies on those who say that it is confined to the direct descendants of the original donee to prove their case, and show by some custom that that was the proper construction of the grant.

Where the original donee of a service-tenure ceases to do any service, and pays in lieu a rent which his descendants continue to pay, the condition of the tenure becomes altered from service to rent ... 211

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(18) As a result of litigation, a decree was passed establishing the title of R as a brother by adoption to L, and a co-sharer of his family-property; but no possession was actually directed to be given to R except of the zemindaree, which was the principal family-estate. Subsequently an execution-creditor of R took possession of two lots, which were no part of the zemindaree proper; the one having been acquired as a separate inheritance by an ancestor, and the other having been purchased by L in the name of the priest of the family:

HELD that R's title to the two lots was the same as his title to the zemindaree; and that the burden of proof lay upon those who insisted that the two lots did not form part of the joint family-estate 231

(19) In a suit by the guardian of a minor to recover possession of certain lands in her zemindaree, and to set aside an alleged mokurruree grant, plaintiff's case was that defendants had held under a ticca lease, and had wrongfully held on after its expiration. Defendants set up an old mokurruree grant under which they claimed to hold in perpetuity upon the payment of a fixed rent.

The High Court, overruling the decision of the first Court upon the Statute of Limitations, held, and in the opinion of the Privy Council, rightly, that the statute does not begin to run in favor of the mokurrureedar against the zemindar, until the latter has had notice that the former claims under a mokurruree grant; and such notice was not given in the present instance twelve years before the commencement of the suit:

HELD, also, in concurrence with the High Court, that the plaintiff's case was a false one, and their kubooleuts forgeries, and though the *onus* lay on the defendant to prove his mokurruree grant, there were sufficient grounds for upholding it as genuine, as an ancient grant brought from proper custody, and verified by long possession and analogous grants ... 252

(20) The ordinary rule which the Privy Council have observed respecting the findings on questions of fact by two Courts, was held to apply to this case, in which plaintiff alleged that he and defendant had lived in commensality, and enjoyed certain joint-property, of which defendant being the elder was the manager, and applied for his share thereof. Defendant alleged that the property was not joint. On this issue, both Courts had found against the defendants.

The Privy Council saw no ground for reversing the decision of the lower Courts ... 275

(21) Under the Hindoo law a married woman is at liberty to make any disposition she likes of money constituting her stridhun or separate and peculiar property; and if she purchases immoveable property with such stridhun, she has a right to sell that immoveable property.

Where the husband during his lifetime did in every way, both publicly and privately, whenever called upon to make any representation on the subject, always represent that certain immoveable property was his wife's, the purchasers from her could not, after his death, be equitably turned out of the property in favor of his heirs. The heirs, after his death, would be as much bound by the father's misrepresentations as he would have been during his life ... 292

(22) The appellant, one of the royal family of Oudh, sued his father, the respondent, for Rs. 50,000 as his share of the dower alleged to have been settled on his mother, the late Oomrao Begum, who left as her heirs her husband (the appellant), her only son, and three daughters, who were made joint defendants. The plaintiff's case was that the dower being unpaid, he, as co-heir, became entitled to three-tenths; but, having regard to the circumstances of the husband, he had limited his claim. The respondent disputed the genuineness of the kabinnama and the amount of the alleged dower, pleading that, whatever was its amount, it had been satisfied during the lifetime of Oomrao Begum. The first Court decreed the suit, but the Lower Appellate Court, holding that the defendant had established his plea of satisfaction, reversed the decision:

PRIVY COUNCIL RULINGS—*(Continued)*.

HELD that the mehrnama was a genuine document, and that the dower was of the amount alleged by the plaintiff subject to modification according to the law and practice in Oudh; but that as plaintiff had taken out no certificate under Act XXVII. of 1860, s. 3, the cause should be remitted to the Judicial Commissioner to have it ascertained what amount of dower was payable by the respondent to the estate of his deceased wife, and what, after payment of debts, was the share of dower due to each co-sharer.

Where it is not expressed whether the payment of the dower is to be prompt or deferred, the rule is to regard the whole as due on demand.

Quære.—Where no time for the payment of deferred dower is expressly limited by contract, must it be presumed to be payable on the death of either husband or wife, or only on the death of the husband? ... 315

(23) The purchaser, at a sale under a decree by which a zemindaree is ordered to be sold, in a suit by a mortgagee, can have no higher title to enhance the rent of the ryots than he would have had if he had been a purchaser from the former zemindar.

A claim to exemption resting upon the ground of a tenure being ryotty kudeemee, does not fall within Regulation VIII. of 1793, s. 51, which relates to dependant talookdars properly so called.

A pottah may be a confirmatory grant only; and there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed.

In cases of substituted service, it is not sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good, namely, that the person who ought to be served is keeping out of the way, has been first established to the satisfaction of the Court ... 253

(24) HELD that the provisions of Act VIII. of 1859, s. 260, were designed to check the practice of making *benamee* purchases at execution-sales, *i. e.*, transactions in which one party secretly purchases in his own account in the name of another party. They cannot be taken to effect the rights of members of a joint Hindoo family, who, by the operation of law, are entitled to treat as part of their common property an acquisition, howsoever made, by a member in his sole name, if made by the use of the family-funds ... 357

(25) The question to be decided was whether certain plots, delineated on a map, belonged to appellant's zemindaree or to that of respondent in whose possession they had been since 1852, when in certain thakbust proceedings they were determined to lie within his estate of Bahur Bund in Zillah Rungpore, and not within appellant's estate in Zillah Goalpara. Appellants sued to impeach the thakbust award, and to recover possession. In the course of litigation, the case was remanded by the High Court upon the issue, which of two given lines was the old bed of the river Sunkosh, when a Sudder Ameen was deputed to make a local investigation, which proved to be in favor of appellant. The case was finally dismissed by the High Court in appeal.

The Privy Council held that the report of the Sudder Ameen failed to establish the line of the old Sunkosh, and that, even if it had embodied conclusions from what had been found and observed on the ground, it would be reasonable to prefer the thakbust proceedings, which were an earlier local investigation, since which the features of the locality may have changed, and evidence of possession lost ... 361

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CRIMINAL RULINGS.

A.

ACCOMPLICE.

(1) Although, under s. 133 of the Indian Evidence Act, the conviction of a prisoner on the uncorroborated testimony of an —— is not illegal, the Court, having reference to illus. (*b*), s. 114 of that Act, considered in this case that the —— was unworthy of credit ... 43

(2) Under s. 133 of the Evidence Act (I. of 1872), a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an —— ... 48

(3) Although, by s. 133, Act I. of 1872, an —— is a competent witness against an accused person, and a conviction would not be illegal, merely because it proceeded upon the uncorroborated testimony of an ——, yet it would be unsafe, where the testimony of the —— is not corroborated in any material point, except by the confession of a fellow-prisoner, whose testimony likewise requires corroboration, to convict the accused ... 68

ACCUSED.

See Deaf and Dumb Person.

ACQUITTAL.

(1) Where the Magistrate dismissed a case in the exercise of a judicial discretion, such dismissal, by s. 212, Act X. of 1872, has the effect of an —— of the accused person. The Court has no jurisdiction to entertain any application to interfere with the —— of an accused person, except the application be made either by Government or under the sanction of Government ... 52

(2) The withdrawal of a complaint by the complainant operates as an ——, and the High Court has no authority to entertain the matter at all, except upon an application duly made with the sanction of Government ... 55

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ARREST.

See Attachment (1) (2) (3)
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ASSISTANT MAGISTRATE.

See Jurisdiction (1) (2)

ATTACHMENT.

(1) *Per Phear, J.*—In order to lay a sufficient foundation for the issue of a proclamation under s. 183, and the accompanying order of ——under s.184, Code of Criminal Procedure, the Magistrate must, upon some sufficient materials, find judicially that the person against whom the proclamation is to be issued has absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him ... 12

(2) *Per Phear, J.*—The period of thirty days, which is prescribed in s. 183 as the minimum period within which the person is to be required by the proclamation to appear, was intended by the Legislature to run from the date in which the publication in the mode prescribed by the same section should be effected ... *ib.*

(3) *Per Phear, J.*—The declaration of forfeiture directed to be made in s. 184, if not made before the person affected by the proclamation has come in, or has been brought in, ought not to be made at all ... *ib.*

ATTEMPTS.

See Miscarriage.

AUTREFOIS ACQUIT.

See Jurisdiction (3)

B.

BOND.

See Security (1) (2)

BREACH OF THE PEACE.

(1) Under the provisions of s. 318 of the Code of Criminal Procedure, the Magistrate should specify the nature of the information received by him, and state the principal facts which, by the exercise of a judicial discretion, he derives therefrom, and which in his judgment constitute grounds for believing that a dispute concerning certain land exists which is likely to induce a —— ; and the roobookaree, which s. 318 prescribes, should plainly set out, without reference to any other documents at all, the actual facts which constituted the ground for such belief on the part of the Magistrate. Case of Sutherland (18 W. R. 11) explained ... 10

(2) Parties who are not stated by a Magistrate to be likely to commit a ——, or to do any act that may probably occasion a ——, cannot be called upon to enter into recognizances to keep the peace, simply because they did not interfere when they might have done so between the persons actually quarrelling so as to prevent a riot,

b.

BREACH OF THE PEACE—*(Continued).*

their laches in this respect not bringing them within the purview of s. 282, Code of Criminal Procedure ... 32

(3) Applications by parties who have been found not to have been in possession, to set aside proceedings of a Magistrate under s. 318 of the Code of Criminal Procedure, which are taken in order to prevent breaches of the peace, ought to be made without any delay ... 38

(4) The words "or to do any act that may probably occasion a——" in s. 282, Act XXV. of 1861, were construed to mean a wrongful act, and not one which the person may lawfully do. It was not intended that a person should be prevented by a Magistrate from exercising his right of property, because another person would be likely to commit a —— if he did so ... 47

(5) A person was bound down under recognizances to keep the peace towards all Her Majesty's subjects for a period of one year. Some time afterwards, he wrongfully confined and extorted a sum of money from two ryots, who were supposed to have committed theft on his lands, he being for such offence fined, and his recognizances forfeited:

HELD that the matter ought to have ended with the fine. For the ryots not having afforded any resistance, no —— took place, and the amount of the recognizances could not be taken ... 48

C.

CHARGE.

See Misdirection.
See Procedure (4)

COMMITMENT.

See Deaf and Dumb Person.
See Jurisdiction (3)
See Procedure (11)

COMPLAINT.

To give a Magistrate jurisdiction to take cognizance of an offence without any —— under s. 68, Code of Criminal Procedure, there must be an offence committed which is punishable under the Penal Code, or under some special Act ... 4

See Acquittal (2)
See Jurisdiction (1) (2)
See Procedure (2)

CONDITIONAL PARDON.

See Procedure (5)

CONFESSION.

Before a —— of a person jointly tried with the prisoner can be taken into consideration against such prisoner, it must appear that that —— implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried ... 67

See Accomplice (3)
See Evidence (4) (5) (6)

CORROBORATION.

See Accomplice (3)
See Evidence (1) (2) (6)

D.

DANGER TO PERSON.

The High Court refused to interfere with an order passed under s. 289 of the Penal Code by a Magistrate fining the owner of a pony which had been tied negligently, which was running about loose in a crowded bazar, and thereby endangering the lives and limbs of persons—that section referring not only to savage animals, but to any animal ... 1

DEAF AND DUMB PERSON.

In the case of an accused person who was deaf and dumb, the Deputy Magistrate who tried and convicted him considered that he did not understand the proceedings, and accordingly referred the case to the Magistrate under s. 186 of the Code of Criminal Procedure. The Magistrate considered that the accused did understand what he was charged with. HELD, that the finding of the Magistrate must prevail, and s. 186 did not apply.

Acting under s. 297, Code of Criminal Procedure, the High Court annulled the order of the Deputy Magistrate, and, as the accused had been previously convicted of an offence under Chapter XVII. of the Penal Code punishable with three years' rigorous imprisonment, ordered that he should, under s. 315 of the Procedure Code, be committed for trial to the Sessions Court 37

DISCHARGE.

A prisoner who had been sent up for trial, and who was discharged by the Deputy Magistrate, was subsequently re-arrested by a Sub-Inspector on the same charge, and sent up for trial. The Deputy Magistrate considered the second arrest to be illegal, and prosecuted the Sub-Inspector for wrongful confinement, and fined him:

HELD, that the Deputy Magistrate was right, the discharge from custody having been a useless procedure if the accused immediately became liable to be re-arrested without fresh material for prosecution of the charge ... 27

See Procedure (6) (11)

DISPOSAL OF PROPERTY.

Under s. 132A, Act VIII. of 1869, no order can be passed with reference to the disposal of any property in a Criminal Court, unless that property is produced before the Court: such order must be made at the time of passing judgment ... 3

DIVORCE.

See Maintenance.

E.

ERROR.

See Procedure (1)

EVIDENCE.

(1) The corroboration which is needed in order to make the testimony of an approver witness trustworthy should be corroboration derived from —— which is independent of accomplices, and not vitiated by the accomplice-character of the witness, and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed, and participated in the acts of commission. The statement must not merely be generally true, but true in the particular points which affect the persons accused ... 16

(2) Under s. 30 of the new Evidence Act (I. of 1872), the statement of fact made by a prisoner which amounts to a confession of guilt on his part may be taken into consideration so far, and so far only, as that particular statement of fact itself extends against the other prisoners who are being tried, as well as himself, for the offence which is thus confessed ... *ib.*

EVIDENCE—*(Continued).*

(3) In a case of murder, the statement made by the deceased in the presence of his neighbours and of a head constable was admitted as relevant —— under s. 32, cl. 1, Act I. of 1872, that section providing that such statement is relevant, whether the person who made the statement was or was not, at the time when it was made, under expectation of death ... 41

(4) The accused made a confession to a Police Inspector, part of which related to the concealment of certain jewels, and in consequence of the information so received, the jewels were discovered:

HELD that, under s. 27 of the Evidence Act, that part of the accused's confession which described his assault on the deceased and her consequent death, and the way in which he became possessed of the jewels, related distinctly to the fact of the discovery of the ornaments, and might be proved against the accused ... 51

(5) S. 30, Act I. of 1872, ought to be construed with great strictness, and the confession of one person is not admissible in —— against another, although the two are jointly tried, if one is tried for the abetment of the offence for which the other is on his trial ... 57

(6) The confessions of persons tried jointly for the same offence may, by s. 30, Act I. of 1872, be "considered" as against other parties then on their trial with them, but such confessions, when used as —— agains others, stand in need of corroboration, and cannot be used as corroborat ing in any way the —— of approvers against such other parties ... *ib.*

See Accomplice (1) (2)

See Confession.

F.

FALSE CHARGE.

Where a person, who is interested in the matter, or has a certain official responsibility, says to a Police officer, "A tells me that X has committed a certain offence, and B and C confirm the statement, and I accordingly suspect X," and follows up that statement by an application to have X's house searched, he prefers a charge against X. If such charge be false, he may be convicted under s. 211 of the Penal Code. 5

FALSE ENTRY.
See Police Officer (3)

FALSE INFORMATION.
See Sanction for Prosecution.

FISH.
See Theft.

FORFEITURE.
See Attachment (1) (2) (3)
See Security (1) (2)

G.

GRAVE PROVOCATION.
See Murder (1)

H.

HAJUT.
See Police Officer (2)

HEAD CONSTABLE.
See Sanction for Prosecution.

HIGH COURT.
See Procedure (3)
See Security (2)

I.

INJURY.
See Police Officer (3)

INSANITY.
(1) HELD, having regard to the provisions of ss. 232 and 425, Code of Criminal Procedure, that, where an accused person at his trial appears to the Sessions Judge to be of unsound mind, the trial of the issue of —— is part of the trial of the accused, and ought to be tried by the jury, and not by the Sessions Judge personally ... 15
(2) A Sessions Judge in his charge to the jury told them that in his judgment the accused was at the time of his trial exhibiting symptoms of unsoundness of mind, and he directed them to find whether the accused was insane at the time he committed the offence: HELD, that the issue as to whether the accused was of unsound mind at the time of the trial, and incapable of properly making his defence was a preliminary issue to that put by the Sessions Judge, and should, under s. 425 of the Code of Criminal Procedure, have been first submitted to the jury... 26

IRREGULARITY.
See Procedure (1)

J.

JURISDICTION.
(1) An Assistant Magistrate of a district has no —— to entertain a case as of his own knowledge under s. 64, Code of Criminal Procedure, as he does not fill the character of a Magistrate of a district, or Magistrate in charge of a division of a district ... 30
(2) Where a case did not come before an Assistant Magistrate on complaint or in any other way than by transfer from the Magistrate of the district who himself initiated the proceedings under s. 68, the proceedings of the Assistant Magistrate were declared to have been without —— *ib.*
(3) In a case in which the accused was charged under s. 200, Penal Code, of the offence of using as true a false declaration which by law is receivable as evidence, the Magistrate, after taking evidence, discharged the accused, as he was of opinion that the charge was not made out, and that the evidence did not justify his framing any other charge against the accused. The Sessions Judge, acting under s. 296 of the Criminal Procedure Code, then directed the Magistrate to commit the accused for trial for forgery:
HELD, that the Sessions Judge's order was bad (1) because it was too vague and indefinite, as it did not specify the document which was forged and the particular in regard to which it was forged; and (2) because it directed the committal of the accused of an offence with which he had not been in any form accused before the Magistrate—s. 296 of the Code of Criminal Procedure empowering the Sessions Judge to direct a commitment only for some offence with which the accused was substantially charged in the complaint, or which was specified in the warrant, or which was framed as a formal charge by the Magistrate at the preliminary hearing. *ib.*
(4) The High Court quashed a commitment in a case in which the charge was that of adultery under s. 497, Penal Code, where it appeared that the committing officer had no jurisdiction, by reason of the offence having been committed at places beyond the local limits of the Sessions division to which the accused was com-

JURISDICTION—*(Continued).*

mitted, and where the Sessions Judge considered that there was no evidence to found a charge of enticing away the complainant's wife within such jurisdiction ... 31

JURY.

See Insanity (1) (2)
See Murder (2)
See Procedure (3) (12)

JUTE.

See License (1)

L.

LAWFUL ACT.

See Breach of the Peace (4)

LICENSE.

(1) Before a conviction for storing jute in a warehouse without a —— can be had under s. 4 of Act II. (B.C.) of 1872, proceedings should be taken under the provisions of Chapter XV. of the Code of Criminal Procedure, as required by s. 34 of the former Act ... 4

(2) Where a person sells liquor in contravention of, and under color of, a —— which stands, not in his own name, but in that of the person for whom he is the recognized agent, he cannot be allowed to evade the provisions of s. 43 of Act XXI. of 1856 by setting up that it is not a —— to himself ... 34

LIQUOR.

See License (2)

M.

MAINTENANCE.

An order for —— having been made under s. 536 of Act X. of 1872, the plaintiff applied to have the order enforced. The defendant, being called on to show cause why the order should not be enforced, divorced his wife (the plaintiff) in the presence of the Court: HELD that, even if such divorce made such an alteration in the circumstance as to justify the Court, on the application of the husband (the defendant), in altering the order for ——, yet the defendant would not be relieved from obeying the order during the time which had elapsed up to the date when and until that change of circumstances had occurred ... 73

MEDICAL EVIDENCE.

See Murder (2)

MISCARRIAGE.

In a case in which the child was full grown, the Court declined to convict the accused of causing —— under s. 312, Penal Code, — that section supposing an expulsion of the child before the period of gestation is completed,—but convicted them of an attempt to cause —— under ss. 312 and 511 read together. 32

MISDIRECTION.

The High Court will set aside the verdict of a jury only in such cases in which, by a —— to the jury, the accused has been materially prejudiced, or where there has been a failure of justice ... 71

MOOKTEAR.

The word "act" in s. 5 of the Pleaders and Mookhtars Act (XX. of 1865), means the doing something as the agent of the principal party which shall be recognized or taken notice of by the Court as the act of that principal. There is nothing in the words of the Act or in its spirit to prevent a person as private agent from going between the prisoner or the duly authorized vakeel upon whom the real responsibility of the defence rests. 8

MURDER.

(1) To enable a person to plead the extenuating circumstances provided for in s. 300, Penal Code, exception 1, the provocation and its effects must be sudden as well as grave, and the deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation ... 35

(2) Where a person under sentence of transportation for life on a conviction for —— is found guilty of —— on a subsequent and different charge, the only sentence that can be passed on him according to s. 303, Penal Code, is that of death. The prisoner, who was charged with having committed ——, was found by the jury who tried him to have been of unsound mind at the time he committed the offence. The Sessions Judge, differing in that point from the jury, referred the case to the High Court under s. 263 of the Code of Criminal Procedure:

MURDER—*(Continued).*

HELD, that in a case of this kind, the High Court will not interfere without the very clearest proof that the jury were mistaken, and that the interest of justice imperatively required the Court to take action under the extraordinary powers conferred upon it by s. 263, Code of Criminal Procedure.

On a consideration of the medical evidence, the Court declined to interfere with the verdict of acquittal which the jury came to ... 45

See Evidence (3)

N.

NAVIGABLE RIVER.

See Theft.

O.

OBSTRUCTION.

See Private Dispute.

See Right of Way.

OFFENCE.

See Complaint.

P.

PATHWAY.

See Private Dispute.

PERJURY.

A statement, untrue to the prisoner's knowledge, made upon oath in the course of a judicial proceeding amounts to ——, notwithstanding the fact that the statement itself is immaterial to the matter before the Court ... 69

POLICE OFFICER.

(1) Mere rashness or negligence on the part of a —— before ordering the search of a man's house for stolen property does not constitute an offence amounting to violation of duty under s. 29, Act V. of 1861. The violation there intended must be wilful intentional violation of some clear duty or other ... 7

(2) *Per Glover, J.*—Where a Sub-Inspector of Police is charged with having detained prisoners for more than 24 hours, it is not necessary for the Crown to prove that he detained them with a guilty knowledge, as s. 124, Act X. of 1872, imperatively lays down that accused persons are on no account to be detained beyond that time except under special order of the Magistrate, which was not obtained in this case ... 36

POLICE OFFICER—*(Continued).*

(3) Where a chowkeedar was charged under s. 218, Penal Code, with having made a false entry in a chowkeedaree attendance-book, with a view to support a charge which was made against a Sub-Inspector of having made a false report regarding the length of absence from duty of another chowkeedar, and thereby to cause loss or injury to the Sub-Inspector, it was held that the intention was too remote to fall within s. 218 ... 40

See Discharge.

See Evidence (4)

See Sanction for Prosecution.

POST OFFICE.

(1) *Per Kemp, J.* (*Glover, J.*, doubting).—The opening of a newspaper by a person employed in the ——, and replacing it in its envelope, does not constitute an offence under s. 48, Act XIV. of 1866, as it could not be said that the accused stole, fraudulently appropriated, wilfully secreted, destroyed, or threw away any letter or other article sent by post ... 4

(2) *Per Kemp & Glover, JJ.*—There must be a fraudulent intention in the act of the accused before he can be convicted under s. 48. *ib.*

PRELIMINARY ENQUIRY BY MAGISTRATE.

See Procedure (6)

PREVIOUS CONVICTION.

See Deaf and Dumb Person.

See Procedure (4)

PRIVATE AGENT.

See Mooktear.

PRIVATE DISPUTE.

Section 62 of the Code of Criminal Procedure does not apply to a —— between two parties relative to a path ... 6

PROCEDURE.

(1) To justify the setting-aside the proceedings on a trial, the error must be a material error within the meaning of s. 297 of the new Criminal Procedure Code—*material* in that section being equivalent to "unless such error or defect has occasioned a failure of justice" in s. 283 ... 28

PROCEDURE—*(Continued).*

(2) A Magistrate removed a case to his own file from that of the Joint Magistrate after the latter had issued warrants upon the footing of the complaint, and immediately suspended the warrants, and dismissed the complaint under s. 67 of the Criminal Procedure Code. HELD that the Magistrate ought to have proceeded with the case as from the stage at which he found it, and that he committed a material error by not doing so ... 28

(3) The Sessions Judge, differing from a majority of the jury who acquitted the accused, referred the case to the High Court under s. 263 of the new Code of Criminal Procedure to be dealt with as an appeal. Before proceeding with the case, the High Court considered it fair to the accused to give him notice to bring forward any objections he may have to the Sessions Judge's recommendation.

On a consideration of the evidence, the High Court convicted the accused of the offence with which he had been charged below. 38

(4) Under s. 439 of the new Criminal Procedure Code, if it is intended to prove a previous conviction against an accused person for the purpose of enhancing the punishment, it is necessary to state the fact of that previous punishment in the charge. If it is omitted, it may be added to the charge at any time previous to the sentence being passed, but not after ... 41

(5) HELD, that a Sessions Judge acted irregularly in at once trying and convicting a person who had been granted a conditional pardon by the Magistrate, and who had been sent up to the Sessions Court as a witness for the Crown. The Sessions Judge was directed to order the Magistrate to commit the accused to the Sessions for a fresh trial after hearing his defence, and examining his witnesses ... 43

(6) Where a Deputy Commissioner held a proceeding in which the accused was charged with forgery, and using a forged document, and after calling on the accused during the inquiry to make a statement, but without calling on him to make any further defence, and after hearing the whole evidence both for the prosecution and for the defence, discharged and acquitted the accused;

PROCEDURE—*(Continued).*

HELD, that there had been no trial, but that this was a proceeding under Chapter XII. of Act XXV. of 1861; that, under s. 202 of that Act, the Magistrate had discretion to examine the accused, and under s. 207 to examine witnesses on behalf of the accused; and under s. 225, the Magistrate, when finding there was no sufficient ground for committing the accused to the Sessions, was competent to discharge and acquit him ... 49

(7) When the charge has been framed and the defendant put on his defence, he has a right, under s. 218 of the Criminal Procedure Code (Act X. of 1872), to have the prosecutor's witnesses recalled for the purpose of cross-examination ... 53

(8) The claim to recall the witnesses for the prosecution is very different from the request made by the accused person to summon a witness under s. 362, Act X. of 1872 ... *ib.*

(9) No appeal lies to the Sessions Court from the order of the Deputy Magistrate refusing to recall the witnesses for the prosecution for the purpose of cross-examination, but the order is such an error as cannot be immediately corrected except by the interposition of the High Court under its powers of superintendence and revision ... *ib.*

(10) When a Magistrate, having called on the prisoners for their defence, takes the evidence of a witness, and finally acquits them of the charge, the High Court has no power to interfere upon a reference made to it under s. 296, Act X. of 1872 ... 55

(11) The High Court has the power, under s. 297 of Act X. of 1872, not only to order the accused to be tried, but also to be committed for trial, if it appear to the High Court that the accused was improperly discharged; but from the absence of the words "order him to be tried" in s. 296, it seems that a Magistrate is not empowered under that section to direct a subordinate Court to take further evidence in a similar case ... 56

(12) Where a case is referred to the High Court under s. 287, Act X. of 1872, the Court is bound, under s. 288 of the same Act, to go into the facts of the case, although the conviction was by the verdict of a jury ... 57

PROCEDURE—*(Continued)*.

(13) By s. 297 of the Criminal Procedure Code, the Court can deal with the case of a prisoner who does not appeal, and is authorized to pass such "order," sentence, or judgment as it thinks fit ... 57

See Acquittal (1)
See Insanity (1) (2)
See License (1)

PROCLAMATION.
See Attachment (1) (2)

PUNISHMENT.
The fact that, except death, no —— more severe than that which the prisoner is undergoing at the time of the commission of the offence can be inflicted is not of itself sufficient to justify the Court in condemning the convict to death ... 68

See Procedure (4)

R.

RECEIVING STOLEN PROPERTY.
Where a person was charged under s. 411 of the Penal Code with —— (rubber, the produce of the Government forests at Cachar), and it was not proved that the rubber came from the Government forests, or that it was stolen property, and that the prisoner knew that it was stolen property, it was held that the conviction under s. 411 was bad, and that he could not be convicted of smuggling—smuggling India-rubber not being an offence under the Penal Code. 37

RECOGNIZANCE.
See Breach of the Peace (2) (5)
See Security (1) (2)

RIGHT OF CROSS-EXAMINATION OF WITNESSES.
See Procedure (7)

RIGHT OF WAY.
Although a road may be a private one, a Deputy Magistrate has jurisdiction to make an order under s. 308, Code of Criminal Procedure, if it appears that s. 320 applies to it, that is, if it is open to the use of a certain class of persons who used it a few days before the occurrence of the dispute ... 33

RIOTING.
See Unlawful Assembly.

ROOBOKAREE.
See Breach of the Peace (1)

RUBBER.
See Receiving Stolen Property.

S.

SANCTION FOR PROSECUTION.
Where a person was accused under s. 182 of the Penal Code with having given false information to a head-constable, it was held that the provisions of s. 168 of the Code of Criminal Procedure had been sufficiently complied with, inasmuch as the Lower Appellate Court stated in its judgment that "the case had been forwarded under s. 182 by the officer in charge of the District Superintendent's office"—the District Superintendent being the official superior of the head-constable ... 33

SEARCH OF HOUSE.
See False Charge.
See Police Officer (1)

SECURITY.
(1) A Magistrate should have due regard to the circumstances of the case and the means of the parties, when fixing the amount in which the sureties should be bound in a case under s. 284 of the Code of Criminal Procedure. Under the provisions of s. 293, a Magistrate cannot direct the forfeiture of a portion of the penalty ... 1

(2) Where the amount of the recognizances was wholly out of proportion to the nature of the dispute, and to the means of the parties, the High Court held that they could not interfere, but the Government might be moved in the matter ... *ib.*

(3) Where sureties, who were required to show cause under s. 305 of the Code of Criminal Procedure why the bond executed by them should not be put in force, failed to establish by evidence the statements which they made, it was held that the order putting the bond in force was a proper one. 29

(4) *Per Phear, J.*—Although the form of security-bond given in the Form (F) of the Appendix combines two bonds, namely, one for the principal, and one on the part of the sureties, the provisions even of s. 300 would be complied with if these two bonds were upon two pieces of paper instead of one ... *ib.*

SENTENCE.
See Murder (2)

SMUGGLING.
See Receiving Stolen Property.

STATEMENT BY DECEASED.
See Evidence (3)

STOLEN PROPERTY.
See Police Officer (1)

SUB-INSPECTOR.
See Discharge.
See Police Officer (2)

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See Security.

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THEFT.
The taking fish in that portion of a navigable river over which a right of julkur exists in another person does not fall within s. 378, Penal Code ... 47

TRANSFER OF CASE.
See Procedure (2)

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See Procedure (2)

U.

UNLAWFUL ASSEMBLY.
It cannot be said that a person intentionally joins an ——, or continues in it, when it appears from the evidence that he went to the place where the members of the —— were gathered to prevent mischief being done to his own property which he had a right to protect... 66

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See Procedure (2)

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The Weekly Reporter.

CIVIL RULINGS.

The 20th November 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Suit for Confirmation of Possession—Declaratory Decree—Evidence—Concurrent Judgments of Indian Courts.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Sheik Torab Ally

versus

Sheik Mahomed Tukkee and others.

Mr. J. D. Bell for Appellant.

Mr. John Cutler for Respondents.

When a plaintiff sues for confirmation of possession, and seeks a declaratory decree, he must make out his title affirmatively. If the Indian Courts agree in holding that he has not done so, even though the High Court may not have attended to the depositions of material witnesses, the Judicial Committee will not disturb the decision of the High Court.

THIS was an appeal from a decree of the High Court of Calcutta, dated the 2nd June 1864, affirming a decree of the Judges of Behar, dated the 3rd October 1863.

The plaint stated that the plaintiff (the appellant) sued for relief from injury and for confirmation of possession of 10 annas and a fraction being his property, and 1 anna and a fraction being the right of lease and sub-lease of a certain mouzah, and that some of the respondents had instituted proceedings under Act IV. of 1840 as mentioned in the judgment of the Judicial Committee. As to the 10 annas and a fraction, the appellant claimed to have bought them with other property for Rs. 15,000 from Bebee Jan, who, on the 29th Bysack 1258, executed a deed of sale to him, and, on the same day, a deed of remission of the balances of the purchase-money remaining after the appellant had paid off a mortgage of about Rs. 1,500. The deeds of sale and remission were not produced in the suit, but were alleged to have been filed by a pleader on behalf of the appellant in some previous proceedings in the Moonsiff's Court at Behar, and burnt there during the mutinies in 1857.

Of the respondents, the two first (two of the appellant's brothers) admitted his title. The third, fourth, fifth, sixth, and seventh (his other brothers and sisters), and some of the others claiming under them, alleged that the 10 annas and a fraction had been purchased benamee in the name of Bebee Jan by her husband Mahomed Afzul, and, therefore, was not hers in absolute right; on the contrary, they alleged that she executed an ikrarnama (which was not produced) to the effect that, on her death, the property should go to her husband's heirs. The remaining respondents claimed the proprietary right in the 1 anna and a fraction.

Among the depositions of the appellant's witnesses were those of the writer of the alleged deeds, of eight attesting witnesses, of the pleader who alleged that he filed both deeds in the Moonsiff's Court, and of six other witnesses who deposed to the existence of the deeds and to their destruction as above. The Zillah Judge, on the 3rd of October 1863, dismissed the suit with costs.

* From the judgment of Kemp and Glover, JJ., in Regular Appeal No. 574 of 1863, decided 2nd June 1864.

The High Court on appeal upheld the decision of the Zillah Judge. In the judgment of the High Court, dated the 2nd of June 1864, the points for consideration were thus stated: (1) Did the property belong to Bebee Jan in sole right? (2) Is the sale by her to the appellant proved? (3) This appellant being undoubtedly a shareholder in the estate, was the Civil Judge right in dismissing his claim entirely? On the first question, after laying down that secondary evidence could not be given of the contents of the ikrarnama, the judgment proceeded as follows:—

"Taking, however, all the circumstances into consideration, we think that there is sufficient proof that the property in question did not really belong to Bebee Jan, but to her husband Sheik Afzul. But, were it otherwise, we think there is no proof of the appellant's allegation in the second issue. Sheik Torab Ally bases his claim on purchase from Bebee Jan. He must prove this before he can recover. Now his statement is that Bebee Jan sold the property to him, and executed a deed of sale on the 29th of Bysack 1258 Fuslee. The kobala is not produced, nor have any of its attesting witnesses been examined. It is said to have been burnt during the mutinies in 1857, whilst in the Moonsiff's record-room at Gya; and a witness, Sheik Meher Ally, formerly employed as a pleader by Torab Ally, deposes that he filed it in a case before the Moonsiff in which the said Torab Ally appeared as intervenor. This witness, an old man of 75, remembered exactly the date of this kobala, the names of the parties, and the precise thing sold; but though he put in on this occasion no less than seven other deeds of sale on the part of his client, he could not call to mind a single particular about any one of them. This is the only direct evidence of the existence of the kobala, and it is, we think, open to suspicion for various reasons. There is no satisfactory evidence that the deed in question was ever filed in the Moonsiff's Court—equally none that it was ever destroyed in the mutinies. The only thing in support of it is the testimony of a single witness, whose statements are irreconcileable with the circumstances of the case, and with each other. It appears, moreover, from the list of documents said to have been filed by Meher Ally, and for which he states that he gave a receipt, that amongst them was a mafeenama executed by Bebee Jan on the same day as the kobala, by which she excused her vendor from payment of the consideration-money on account of the sale. This, next to the deed of sale, was the most important document entrusted to Meher Ally, but, strange to say, he does not even mention it in his deposition. Under such circumstances, we think that the secondary evidence of the existence of the kobala adduced by the appellant is inadmissible. But, were it not so, what are the circumstances of this case? The date of the alleged kobala is the 29th of Bysack 1258 Fuslee, the very day, we observe, on which Bebee Jan died. The mafeenama, granting for the sake of argument that there was such a document, is dated the same day; so that admitting for the moment that Bebee Jan, on the day of her death, executed these documents in favor of Torab Ally, there would still be a difficulty in the latter's way on the well-established rule of Mahomedan law, which restricts death-bed gifts to certain narrow limits; the whole matter must stand, or fall together. If, that is, Bebee Jan sold the property to the appellant, she likewise forgave him the purchase-money, her conveyance, therefore, was an ordinary gift; and as the donor died on the very same day, the gift became a death-bed gift, and, consequently, illegal to the extent claimed. So much for the only direct evidence adduced in support of the kobala. On the other hand, there is very respectable testimony to show that Bebee Jan, although the nominal owner of the property, was not the real one; and that after her death, Torab Ally was in possession merely as manager and trustee for the younger members of the family; none of the documents filed prove her sole or absolute possession any more than Bebee Jan's before him. Taking, therefore, all the circumstances into consideration, we think that the appellant has not proved either Bebee Jan's absolute ownership in the disputed property, or her conveyance under a kobala to himself; and that, as this forms the basis of his claim, he cannot recover."

On the third question, the High Court held that, as the respondent admitted the appellant's right to a share of his father's property, and that he had always been in possession of it, and as the amount of such share is settled by the principles of Mahomedan law, there was no need for the Court to declare it.

Mr. Bell, for the appellant, contended (1) that the evidence was not sufficient to justify the finding of the High Court that the property did not belong to Bebee Jan in absolute right; (2) that the High Court were totally wrong in saying that there was only one witness to the existence of the deed of sale,

and that none of the attesting witnesses had been examined, inasmuch as the writer of the deed and all the attesting witnesses had been examined, and there was a mass of respectable testimony to the existence of the deed; (3) that Bebee Jan died in the month of Jeit, as deposed to by appellant's witnesses, and not on the 29th Bysack; (4) that there was no issue raising the invalidity of the deed of sale, and remission looked at as a death-bed gift.

Mr. J. Cutler for the principal respondents, after stating that he did not appear for the respondents claiming the proprietary right in the 1 anna and a fraction (as to which nothing had been said in argument on behalf of appellant), contended (1) that nothing had been shown to induce their Lordships to overrule the finding of the High Court, negativing the absolute ownership of Bebee Jan, founded, as it was, upon the testimony of thirteen witnesses that she was a benameedar; (2) that, even if the High Court had overlooked the depositions of some of the witnesses, there was sufficient other evidence to justify them in finding that the existence of the alleged deed of sale was not proved; (3) that, as both Courts had found the 29th Bysack as the date of Bebee Jan's death, the deeds of sale and remission were void as a device to defeat the Mahomedan law of death-bed gifts, and that this contention was tenable upon the first issue in the suit; (4) that the appellant, being, as he alleged, in possession, was not entitled to a declaratory decree, because he could not ask for any consequential relief (Rooke *vs.* Lord Kensington, 2 Kay & Johnson 761); (5) that, to entitle the appellant to a declaratory decree, he must establish his title affirmatively, the *onus probandi* being on him (Rossonada Raya *vs.* Sitharame Pillai, 2 Mad. H. C. Rep. 171), and that he had not done so in this case. The improbabilities of his story must be looked to, and regard had to the fact that Bebee Jan was a *purdanasheen* (Grish Chunder Lahoree *vs.* Bhuggobuttee Debia,* 13 Moo. I. A. 431); that she was alleged to have executed these deeds on the day of her death, when she could not be supposed to be in possession of her full faculties (Kermaroonissa Begum *vs.* Mirza Syfoolah Khan, 5 W. R., C. R, 198); and that the inadequacy of the consideration showed that, if anything, it was a gift (Doe *vs.* Routledge, Cooper 705).

* 14 W. R., P. C., 7.

Mr. Bell in reply admitted that the appeal must be dismissed as regarded the respondent's claiming the 1 anna and a fraction, but urged the importance to his client of a declaratory decree; and that if the appeal were dismissed at all, it should be without prejudice to any future proceedings.

Sir Barnes Peacock delivered the following judgment:—

This is a suit brought for confirmation of possession.

It appears that Sheik Mahomed Afzul had three wives. By his wife Mussamut Wujjeeha he had several children, namely, the appellant and the respondent in this suit. His wife Bebee Jan had no issue. Sheik Torab Ally, the appellant in this suit, claims to be entitled to certain property which, he says, belonged to Bebee Jan, who, he says, conveyed it to him by a bill of sale, and afterwards remitted to him the whole of the purchase-money, with the exception of a small portion which he paid off to a mortgagee. The respondents, his brothers and sisters, say that the property did not belong to Bebee Jan in her own right, but that it was purchased by Mahomed Afzul, her husband, in her name benamee for him; and, consequently, that, upon his death, it became vested in the respondents and the plaintiff, as his heirs.

The two main questions in the suit were: First, whether Bebee Jan bought the property for her own benefit, or whether it was purchased by her husband in her name benamee for himself; and, secondly, whether, assuming that the property belonged to Bebee Jan in her own right, and that she did not hold it benamee for her husband, she conveyed it by bill of sale to Sheik Torab Ally.

Now this is a suit not for relief, but for confirmation of possession. The plaintiff says that he sues on a claim for relief from injury and for the confirmation of his possession. He then states that the defendants commenced a proceeding against him under Act IV. of 1840, claiming that he was about to injure them, and that if the Magistrate did not interfere, a riot would take place; that the Magistrate did interfere and decided in favor of the plaintiff. The Magistrate had no right whatever to enter into any question of title. He was simply to decide as to who was the person in possession. The plaintiff says: "He decided that I was in possession, and "that I was to be retained in possession;" but, subsequently, that decision of the Magistrate was reversed by the Sessions Judge. Then he says: "From that date, the defend-"ants have been practising various frauds,

"and raising disputes against my possession. "The cause of action arose from the passing "of the said decision of the Court of Circuit. "I pray that by, issuing summons to the "defendants, and making investigations "required by the Court, my possession of the "property claimed may be ordered to be "confirmed," that is, he asked not merely that he should be retained in possession, but that the Court should declare affirmatively that this possession was accompanied by title. This involves the necessity of determining the two questions to which I have referred.

Now the evidence upon both those points was exceedingly unsatisfactory. If the plaintiff meant that the Court should declare that the property belonged to Bebee Jan, it was necessary for him, in a suit of this nature, in which he asked for an affirmation of his title, to show affimatively how the property became vested in Bebee Jan, and out of whose money the property was purchased. But he has failed to do that, and their Lordships are of opinion that he has not proved affirmatively that the property did belong to Bebee Jan in her own right.

Then, with regard to the bill of sale, some of the witnesses prove that a bill of sale was executed by Bebee Jan on the 29th of Bysack 1258. Both the Judge in the Court below, and the Judges of the High Court, have found as a fact that Bebee Jan died on that very day; and it certainly is very inconsistent with the whole of the evidence that, if she died on the 29th of Bysack 1258, she should have executed a deed on that very day in the manner in which the witnesses depose that it was executed.

The deed is not forthcoming, and the excuse for not producing it is, that the plaintiff intervened in a suit in the Moonsiff's Court between other parties; that he gave this deed and another deed, to which we shall presently advert, to his pleader; that that pleader gave him a receipt for the two deeds, and filed them in the Moonsiff's Court; and that, during the mutiny, the records of the Moonsiff's Court having been destroyed by the mutineers, those two deeds are not forthcoming.

It is a very important fact that, there being two deeds, namely, the deed of sale and the deed of remission, and the pleader having given his receipt for those two deeds, the only deed which in the record of the Moonsiff is stated to have been lodged in his Court is the deed of sale. There is nothing on the records of the Moonsiff's Court to show that the deed of remission was lodged. We have, therefore, only the evidence of the pleader that he lodged that deed as against the fact that, in the record of the proceedings of the Moonsiff as to the documents which were lodged in his Court, no notice whatever is taken of the deed of remission.

If that deed of remission existed and was not lodged in the Moonsiff's Court, it would not have been destroyed with the other records of the Moonsiff, and it ought to be forthcoming. If it existed, and was not destroyed, it would have been very important that it should be produced to the Court, because in all probability that deed would have recited the bill of sale. The remission is said to have been executed under these circumstances: The plaintiff was to pay to Bebee Jan Rs. 15,000 as the purchase-money of the property; he says that he paid out of the purchase-money to the holder of a zur-i-peshgee lease about Rs. 1,400, and that then Bebee Jan excused him by this deed from paying the remainder of the purchase-money. It is most extraordinary that all this should have taken place on the day of the lady's death; that, in the first place, she should have executed to him an absolute bill of sale, treating Rs. 15,000 as the purchase-money; that on that same day she should have executed to him a remission of the remainder of the purchase-money, giving him credit only for that portion which he had paid off to the holder of the zur-i-peshgee. If he did pay off the zur-i-peshgee or mortgage, there is no reason given why the zur-i-peshgee holder has not been called as a witness. His evidence would have been most important. If the case is true, he would have said: "I was the holder of a zur-i-"peshgee lease. I was paid off the amount "of my mortgage by the appellant, and I "delivered up my zur-i-peshgee lease to him;" but neither the holder of the zur-i-peshgee lease, nor the lease itself, which was paid off, is produced.

Under these circumstances, the Court cannot say that they are so satisfied affirmatively of the plaintiff's title that they can declare, not only that he has possession, as he says he has, but that he has that possession in consequence of a valid and good title. The Court cannot make such an affirmative declaration of title upon the evidence which has been given in the cause.

Their Lordships are, therefore, of opinion that the decision of the Court below is substantially correct, and that the suit ought to be dismissed. But they cannot help remarking that, as regards the deed of sale,

the learned Judges of the High Court, in expressing their opinion regarding the bill of sale, do not appear to have had before their minds the whole of the evidence in the cause.

Looking, then, to the case as it stands, the nature of the suit, and the nature of the evidence that has been given, their Lordships think that the appeal ought to be dismissed, and the judgment of the High Court affirmed, which dismisses the suit; but that the dismissal of the suit ought not to be treated as a binding adjudication of title between the parties.

Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be dismissed, and the judgment of the High Court affirmed, with costs, but with a declaration that the judgment and decree in this suit do stand without prejudice to any question of title between the parties in any future suit or proceeding.

There was one point I should have mentioned that the suit proceeds for 10 annas sold as the plaintiff's property, and 1 anna sold as his right of lease and sub-lease. Mr. Bell has admitted that he cannot maintain the decision as to that 1 anna odd; consequently as to that there will be a simple dismissal, without any declaration as to its being without prejudice.

The 26th November 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation in Rent-suits—Act X. of 1859, s. 32—Act XIV. of 1859.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Unnoda Persaud Mookerjee and others

versus

Kristo Coomar Moitro and others.

Mr. Leith and *Mr. Doyne* for Appellants.

The Respondents were not represented in the appeal.

The bar of limitation applicable to an action for rent brought in the Collector's Court under Act X. of 1859 is that provided by s. 32 of the same Act, and not that provided by Act XIV. of 1859; the special legislation contained in the Rent Law not being repealed by the general law of limitation, either by express words, or necessary implication.

Sir Montague Smith.—THE single question to be decided in this appeal is whether to an action for rent brought in the Collector's Court under Act X. of 1859 (The Rent Act), the bar of limitation applicable to it is that provided by the 32nd section of the same Act, or that provided by Act XIV. of 1859, passed six days later.

If the limitation of section 32 of Act X. is still in force, the action is barred; but if, as the appellant contends, that section has been repealed, and the limitation of Act XIV. is applicable to the case, then it is not.

The 32nd section of Act X. enacts that suits for the recovery of arrears of rents shall be instituted within three years from the last day of the Bengali year, or from the last day of the month of Jeyt of the Fusli or Willayuttee year, in which the arrear shall have become due.

By Act XIV., section 1, clause 8, the limitation applicable to suits for the rent of any buildings or lands is the period of three years from the time the cause of action arose.

The present suit would be barred even under Act XIV., but for the operation of clause 14 of that Act which provides that, in computing the period of limitation prescribed by that Act, the time occupied in prosecuting an abortive suit, shall, under certain conditions, be excluded. There has been litigation which would bring the present case within this section and prevent the suit being barred if Act XIV. is applicable to it. There is no analogous provision in Act X., and it is admitted by the appellant that, if that Act governs, the suit is barred.

Act X. is not expressly and specially repealed; but the enactments of the later Act are no doubt in their terms large enough to include the limitation contained in it; for section 1 of Act XIV. enacts that "No suit shall be maintained unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or regulation to the contrary notwithstanding," and among the suits to which it is enacted that "the same shall be applicable" are "all suits for the rents of any buildings or lands (other than summary suits before the Revenue authorities under Regulation V. of 1822 of the Madras Code)." Section 18 of the same Act also enacts that "All suits to which the provisions of this Act are applicable shall be governed by this Act, and

* From the judgment of Morgan and Seton-Karr, JJ., in Regular Appeal No. 437 of 1864, decided 21st April 1873.

no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding."

The question, however, arises whether the special legislation contained in Act X. is not of such a special kind that, according to a well-established rule for the construction of statutes, it should be presumed that the Legislature did not intend by the general enactment to interfere with it. The reason for this rule of construction is well expressed by Lord Hatherley, when Vice-Chanceller, in Fitzgerald *vs.* Champneys (30 Law J. 782), and in terms which appear to be very applicable to the legislation their Lordships have to consider in the present appeal :—

"The reason is that the Legislature having had its attention directed to a special subject, and observed all the circumstances of the case, and provided for them, does not intend, by a general enactment afterwards, to derogate from its own act, where it makes no special mention of its intention to do so."

Act X. established a Rent Law for the Bengal mofussil only; it was intended to form a special and complete Code of Procedure with regard to the trial of questions relating to rent and the occupancy of land in the mofussil, and by which all the proceedings before the Collectors were to be regulated and governed. The preamble shows an intention to deal with questions regarding the rights of ryots in relation to the occupancy of lands. One of the objects was to prevent oppression. It recites that it was expedient to extend the jurisdiction of the Collectors, and to prescribe rules for the trial of the above questions, as well as of suits for the recovery of arrears of rent; and section 23 (clause 4) enacts that "All suits for arrears of rent due on account of land either kherajee or lakheraj, or on account of any rights of pasturage, forest rights, fisheries, or the like," shall be cognizable by the Collectors, and shall be instituted and tried under the provisions of the Act, and shall not be cognizable by any other Court or in any other manner.

This enactment gives exclusive jurisdiction to the Collectors, and clearly indicates the intention of the Legislature to be that the special questions, which are thus made the subject of peculiar legislation, shall be tried according to the procedure established by the Act, and in no other manner.

The provision for the limitation of suits is a part of the procedure thus established.

The period prescribed by Act X., as already stated, is "three years from the last day of the Bengali year, or from the last day of the month of Jeyt, of the Fusli or Willayuttee year in which the arrears became due." A proviso is added that, if the suit is for enhanced rent not confirmed by a competent Court, the suit must be brought within three months from the end of the year, as above defined, on account of which, the enhanced rent is claimed. The period thus defined and prescribed, and the provision as to enhanced rent, show that these rules were framed with especial reference to the case of ryots and other tenants in the mofussil, and to their times and modes of paying rents.

Act XIV. has no provision as regards enhanced rent, and it could hardly have been intended that part of the limitation, as regards the rents of ryots, should be found in one Act, and part in another.

Reading together the 23d and 24th sections of Act X., it will be found that the Act prescribes the same period of limitation for rent of land, and of rights of pasturages, forest rights, fisheries, or the like. Act XIV., by the enactment relied on as superseding this limitation, relates to rents "of buildings, or lands" only. These words, clearly, would not comprehend rent of rights of pasturage, forest, and the like. It is plain also that the longer periods mentioned in Act XIV. would not be applicable to suits for these rents, in consequence of the 3rd clause of that Act. Such suits would still be governed only by the limitation in Act X.; and the consequence, therefore, of holding that the limitation, as regards suits for rents of land in Act X., is repealed by the later statute, would be to establish different periods for suits for rents of land, and those for rents of pasturage and the like.

It cannot reasonably be presumed that, when the Legislature, in the particular legislation specially devised to meet the case of all these rents, had put them in the same category; it intended by the subsequent general Act to separate and assign different periods to them. No reason can be suggested for such a separation, or for supposing that the Legislature meant that the provisions to be found in clauses 11 to 14 of Act XIV., suspending or prolonging the periods of limitation when certain disabilities exist, should extend to one set of these rents, and not to the others. It should be observed that none of these provisions are introduced into Act X., and it may well be that the Legislature thought they were not adapted to the cases for which the simple procedure established by that Act was intended to provide.

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Another point arises on a comparison of the Acts which is material to be regarded in construing them. Act X. was to come into operation at once, Act XIV. only after an interval of two years; and different provisions were made in the two Acts as to suits for arrears due at the time of the passing of the Acts. It does not seem a violent presumption to suppose that the Legislature, in framing the two Acts with these distinctive provisions, intended that both should have independent force.

The fact that the Acts were virtually contemporaneous appears strongly to support the presumption arising from the above considerations, *viz.*, that it was not meant that the harmony of the system of the Special Act, which had been designed for special objects, should be disturbed by the general Act.

The words "rent of any buildings or lands," which occur in Act XIV., are, no doubt, sufficiently large in themselves to comprehend all lands; and their Lordships cannot assent to one of the reasons given by Chief Justice Norman for his judgment in the case of Poulson, Junr., *vs.* Chowdry (2 Weekly Reporter 21), *viz.*, that the words "rent of lands" might be construed to be confined to lands appurtenant to buildings. They think the words cannot be so limited, for Act XIV. was a general law intended to have force throughout the British territories in India. But these comprehensive words will have effect and operation, without holding them to apply to the special legislation of Act X., which is confined to the Bengal mofussil.

It should be observed that, although Act XIV. proposes to consolidate the laws relating to the limitation of suits, it clearly was not intended to be of universal application. It is confined by section 18 to suits "to which the provisions of the Act are applicable." The Legislature, therefore, contemplated some cases of limitation which would remain unaffected by the general legislation. It would certainly be an unfortunate result of the attempt to consolidate the law, if the effect of the legislation was that, as to suits for rents triable by the Collectors under Act X., the limitation of them was to be found partly in that Act, and partly in Act XIV. It would seem to conform more to the spirit of the legislation so to construe the Acts as to prevent this result.

The exception in Act X. of summary suits before the Revenue authorities, under Regulation V. of 1822 of the Madras Code, has been strongly relied on by the appellants, as indicating an intention not to except suits before the Collector under Act X. Undoubtedly, this exception adds to the difficulty of construction. But the Madras Regulation related to summary suits. Suits of that kind were abolished in Bengal by Act X., and a Code of special procedure, with special rules, including one of limitation, substituted for them. It may not have occurred to the framers of Act XIV. when referring to these summary suits in Madras, that it was necessary to except, by express words, suits of another kind regulated in their entirety by special legislation.

Difficulties have frequently been imposed on Courts of Justice in construing statutes, arising from the apparent conflict between special and general legislation; and the rule of construction that special legislation is not repealed by general enactments, unless a clear implication of that intention can be found, was adopted in early times to meet these difficulties, and has been acted on in numerous modern instances. (See Thorpe *vs.* Adams, L. R., 6 C. B. 125; The Queen *vs.* Champneys, *Ib.* 384.) In the latter case, Bovill, C.J., says: "It is a fundamental rule, in the construction of statutes, that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication."

Their Lordships, upon a comparison of the two statutes in question, with reference to their objects, and considering that they were virtually contemporaneous Acts, have come to the conclusion that the intention to repeal the particular law is not made distinctly to appear, either by express words or necessary implication, and, consequently, that the limitation of Act X. remains in force.

They are not dealing with the question as *res integra*, for the same construction was given to the Acts by the Full Bench of the High Court of Bengal, in the case of Poulson *vs.* Chowdry* already referred to, which was decided in the year 1865. It is true that this decision preceded, by a short time only, the judgment now under appeal; but it has probably been acted upon in the numerous suits which must since have arisen in the Bengal Presidency under Act X. Unless, in this condition of things, their Lordships found that the above decision of the Full Court was manifestly wrong, they ought

* 2 W. R. 21.

not to disturb it. They have not arrived at this conclusion, and it will, therefore, be their duty in the present case to advise Her Majesty to dismiss this appeal, and to affirm the judgment of the High Court.

The 26th November 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Family Usage—Law of Succession—Lex Loci.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Rajah Raj Kishen Singh

versus

Ramjoy Surma Mozoomdar and others.

A settlement of an estate made at the time of the Perpetual Settlement would not, of itself, operate to destroy a family usage regulating the manner of descent, either in the case of a well-established raj, or even where the origin could not be shown.

In point of law, a manner of usage of descent of an ordinary estate may be discontinued so as to let in the ordinary law of succession; such family usages being in their nature different from a territorial custom which is the *lex loci* binding all persons within which it prevails.

It is of the essence of family usages that they should be certain, invariable, and continuous; and well-established discontinuance must be held to destroy them.

THIS suit was originally brought by Rajah Prankishen Singh against Hurrosoonderee Dabee, widow of one of his brothers, Gopeenath Singh, and some purchasers from her, to recover possession, "by right of family custom," of one-third of 14 annas of Pergunnah Soosung.

Rajah Prankishen died during the progress of the suit, and the present appellant is his eldest son. Hurrosoonderee is also dead; the respondents, Buroda Debia and Pranoda Debia, are daughters of Gopeenath and Hurrosoonderee; the respondent Gour Kishore Lahoree is their grandson, being a son of Buroda Debia.

The plaint states that, "according to family custom prevalent in the raj or estate, the right of the plaintiff, as proprietor, accrued to the estate since the death of his father, Rajah Bishonath Singh."

The claim is rested entirely on the ground of family custom under which it is alleged that the estate was descendible on the eldest son, to the exclusion of the other sons.

It appears that the entire 16 annas of the pergunnah were at one time enjoyed by the ancestors of the family, but 2 annas were afterwards alienated, and it appears to be assumed on both sides that these 2 annas were a long time ago given as dower on the marriage of a daughter of one of the possessors.

Rajah Raj Singh, the grandfather of the plaintiff Prankishen, died in 1822, leaving three sons, Bishonath (the father of the plaintiff Prankishen), Gopeenath, and Juggernath; and it is undisputed that on his death the three sons presented a joint petition to the Collector, describing themselves as the heirs of their father, and proprietors of the pergunnah, and praying to be registered; and that they were so registered for the 14 annas.

Gopeenath held the one-third of the estate until his death; his widow Hurrosoonderee succeeded to the possession; and when the present suit was commenced against her in 1861, Gopeenath, and she as his widow, had been in possession for nearly forty years, *viz.* from 1822 to 1861.

The appellant contends not only that the estate is descendible on a single heir male, but also that it is impartible and inalienable.

The High Court came to the conclusion that the plaintiff had failed to establish by evidence the exceptional family-custom on which he relied, and reversed the contrary decision of the Principal Sudder Ameen.

The two main questions argued at the bar were, *1st*, whether the family-custom had been proved? and, *2nd*, if so, what was the effect upon it of the acts and conduct of the family on Rajah Singh's death in 1822, and subsequently?

There is, undoubtedly, evidence which leads reasonably to the belief that, formerly, the estate was held, from time to time, by individual male members of the family; but the evidence leaves in obscurity the character and nature of the estate, and the tenure by which it was held under Mahomedan rule. Some firmans and other documents, filed in a former suit, and which were sought to be made evidence in the present to show the early title, are referred to by the Principal Sudder Ameen and the High Court in the following manner:—

The Principal Sudder Ameen says:—

"It appears, by a decision of the Sudder Court of the 12th May 1856, filed by the answering defendants, that the zemindary

* From the judgment of Loch and Seton-Karr, JJ., in Regular Appeals, Nos. 407, 495, and 515 of 1862, decided 24th January 1865.—2 W. R., *Civil*, 80.

abovenamed was formerly acquired as a jageer by Rajah Ramjibon, by a firman of the year 1650 A. D., granted by the Emperor Shah Jehan, and at his death that jageer was conferred upon his son Rajah Ram Singh by a firman of the year 1680, granted by the Emperor Shah Alum Ghir; and after his death it was conferred as a jageer upon Rajah Kishore Singh, son of Rajah Run Singh, by a firman of the year 1749, granted by the Emperor Ahmed Shah."

The High Court, referring to these documents, say:—

"It may be admitted, as held by the Judges who disposed of the case on the 12th May 1856, that there is something peculiar in this property. It is not improbable that it was, as alleged by the plaintiff, a jageer for military services, and as such held by one of the members of the family, usually the eldest son or brother, and that women were excluded from the succession as being incapable of performing the duties required from the jageerdar. This succession, however, was not regulated by any family-custom, but by the will of the sovereign power; and, on referring to the judgment of 1856, we find mention made of three firmans from the Mahomedan Government, only one of which is forthcoming in the present case, which prove that the property was held as a military fief, and that the holder succeeded, not by right of primogeniture, but by the will of the sovereign."

And again:—

"The copies of the firman, bearing date 29th Shaban (1st Juloss), of Ahmed Shah, and of the hibanamah from Ram Singh to Run Singh, cannot be looked at, no reason having been assigned for the absence of the originals, which are said to have been filed on a former occasion. The grant of Kishore Singh to Raj Singh, dated 25th Maugh 1169, is clearly an untrustworthy document, and has only seen the light for the first time since this case was remanded; and, even if genuine, it proves nothing, so we are thrown back upon one single document, bearing date the 22nd year of the reign of Mahomed Shah, which is denounced by the opposite party to be a forgery. This document purports to be a firman from the Emperor Mahomed Shah to Run Singh, confirming the jageer of Soosung to him, and requiring him to keep up a certain body of troops, consisting of cavalry and infantry. Admitting, for the moment, that this document is genuine, it really proves nothing in support of plaintiff's allegation. It does not prove the property to be raj, for no such name is used. It is termed a jageer, a tenure to be held as compensation for military service, and which might be transferred, at the will of the ruling power, to any other person on the same or different terms. The grantee, also, is not styled or in anywise recognized as a Rajah, but simply as a zemindar, so that this document establishes nothing which the plaintiff seeks to prove. But, looking at the document, we have little doubt that it never came out of the royal office, either at Delhi or elsewhere. It is written on common paper, and stamped with an oval seal, which could be prepared in any bazaar of India, and nothing is shown by which we might test the genuineness of the seal."

Their Lordships find great difficulty, upon these judgments pronounced by Judges who had greater opportunities than they possess of testing the genuineness of the documents, in drawing any safe conclusion from them; and the learned Counsel for the appellant felt the same difficulty, and did not press them, contending they were not material to his case.

If these documents could at all be relied on, their Lordships agree with the High Court in thinking that they point to the conclusion that the estate was held under the Mahomedan rulers as a military jageer on the tenure of military service, by virtue of grants made from time to time to individual members of the family, and was not strictly an inheritable estate. If, on the other hand, reliance cannot be placed on these documents, then it is left altogether in doubt what was the original character of the estate, and the nature and conditions of its tenure.

Although much of what appears in the record, including the elaborate pedigree, must be rejected, there is still evidence that the manner of succession relied on by the appellant, however originating, did, in fact, prevail for some time in the family.

On the death of Rajah Kishore Singh in 1784, a perwannah was issued to his younger brother, Rajah Raj Singh, by the East India Company, who then held the grant of the Dewanny. It was addressed to him as "zemindar of 14-anna share of Pergunnah Soosung," and states the death of the late Rajah; and goes on thus: "The zemindary of kismut, 14 annas of Pergunnah Soosung, which were fixed on your brother, has, according to custom, been confirmed to you."

It thus appears that Rajah Kishore Singh

had a living brother, and this perwannah was properly relied on as affording evidence that the deceased Rajah Kishore Singh had, notwithstanding, held the zemindary as sole possessor. Rajah Kishore had no sons, but left a widow, and the fact that she did not succeed to the zemindary, and that his brother Rajah Raj Singh was confirmed in it on his death, also points to the conclusion that the custom was supposed to prevail at the time of Rajah Raj Singh's accession in 1784.

Rajah Raj Singh continued to hold the zemindary until his death in 1822. He was recognized as zemindar by the British Government at the time of the Perpetual Settlement, and the settlement of the 14-anna share of Pergunnah Soosung then was made with him at the old peshkush (tribute), and not on a newly-calculated jumma. It should, however, be observed that it appears from the accounts of the Collectorate that the other 2-anna shares, formerly severed and alienated, were settled with the zemindars who owned them, preciselyin the same manner.

In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military jageer, requiring the render of services, if any such ever existed, were, as conditions of tenure, implicitly at an end; and that the zemindary, so far as relates to tenure, was thenceforth held under the Government as an ordinary zemindary free from any such conditions.

The settlement would not, however, of itself, have operated to destroy a family-usage regulating the manner of descent. It would not have had this effect in the case of a well-established raj (see Baboo Beer Pertab Sahee *vs.* Maharajah Rajender Pertab Sahee,* 12 Moore's I. A. 1), and, even in the case where the origin could not be shown, it may be assumed that it would not, of itself, affect an existing family-custom.

Regulation XI. of 1793 was passed soon after this settlement. The Regulation has been held not to be applicable to the succession of a well-established raj (see 12 Moore 1,* and 6 Moore 161-7). But the respondents contend that, notwithstanding the qualification placed upon it by Regulation X. of 1800, it does govern a case like the present, where the claim rests only on a continuing family-usage, and not on the peculiar character of the zemindary itself or on a local or district custom (see Rajah Deedar Hossein *vs.* Ranee Zuhoor-oon Nissa, 2 Moore I. A. 441).

Their Lordships do not think it necessary to give any opinion on the positive effect of Regulation XI. of 1793; for they think that, in the present case, there is sufficient ground for the presumption that, after the settlement and this Regulation, the family were induced to regard the former state of things, and the ancient tenures, whatever they were, were at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that, in fact, they did so consider and treat it.

Their Lordships propose to refer to the most important of these acts. It has been already stated that, upon the death of Rajah Raj Singh in 1822, his eldest son Bishonath, and his two younger brothers, Gopeenath and Juggernath, presented a joint petition to the Collector. It was a public act, and the document is distinct and unequivocal in its terms. The three petitioners, who are each described as Rajah, and sons of Rajah Raj Singh, state that the raj of 14-anna shares of Pergunnah Soosung was recorded in the serishta in their father's name, and that he being dead, "they are the heirs and proprietors" of the property, and they pray to be so registered, and were registered accordingly as joint proprietors.

It is plain that this was not a merely nominal petition; for there is clear evidence that the three brothers took and enjoyed in equal shares the profits of the estate. The three brothers also agreed by a document, in which they are described as "in possession and proprietors," to pay the Government revenue of Rs. 17,240.

In 1829 Juggernath died, and thereupon his widow, Ranee Indromonee, was registered as joint owner with Rajahs Bishonath and Gopeenath.

In April 1832 Rajahs Bishonath and Gopeenath and the Ranee Indromonee presented a joint petition, praying for time to pay the amount of a decree obtained against them. The petition describes them as "zemindars of the pergunnah."

Afterwards, Rajah Gopeenath died, and his widow, Ranee Hurrosoonderee, was also registered as owner for his share.

In 1839, and again in 1841, suits were brought against tenants by the Rajah and the two Ranees for rents due, and in 1842 a joint-suit was instituted by the three for possession of part of the estate.

* 9 W. R., P. C., 51

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The transactions above enumerated show a series of important acts in dealing with the estate as joint-family property, extending over a period of twenty years, all founded upon the footing that the ordinary rules of succession governed the descent.

It is now necessary to advert to some subsequent litigation.

It is alleged that, in 1843, Hurrosoonderee and a son she had adopted brought a suit against Rajah Bishonath and Indromonee for a partition of the zemindary, in which the Rajah set up as a defence that the raj was impartible, and descended on the eldest male heir. It is said that this defence was successful. But the proceedings in this suit were not satisfactorily proved, and the attempt to rely on it as an estoppel failed.

Other litigation followed, raising the same question, but with a different result.

Indromonee, the widow of Juggernath, died, leaving an alleged adopted son, whose guardian claimed the possession for him. This was opposed by Bishonath on the ground of the family-custom, but, in the end, possession was awarded to the guardian. In 1847 Bishonath commenced a regular suit to obtain the one-third share of Juggernath, on the ground that the alleged adoption was invalid; and also again setting up the family-custom of primogeniture. In this suit, which went on appeal to the High Court, a Full Bench decided against the existence of the custom.

Rajah Bishonath died in August 1853. After his death, his son, Rajah Prankishen (the plaintiff in the present suit), did not prosecute an appeal to Her Majesty in Council, which had been commenced against the above decision of the High Court, but brought another suit against the guardian of this adopted son of his uncle Juggernath, on the ground that the adoption was not *bonâ fide*, and claimed one-third of the estate as heir to his uncle. This suit is founded on the assumption that the custom had been negatived in the former one, for Prankishen now claimed, not on the footing of the custom, but as heir to his uncle, according to the ordinary rule of succession; and upon the ground that the adoption was not *bonâ fide*, he succeeded in the suit.

Various considerations were put forward by the learned Counsel for the appellants to destroy or diminish the effect of the facts, which have just been adverted to. It was suggested that Bishonath may have allowed his brothers to take, each, one-third share for maintenance; but their Lordships are of opinion that the evidence points very clearly to the conclusion that the brothers were admitted to the possession as co-heirs and co-sharers, not on sufferance merely, but as of right. The learned Solicitor-General, indeed, admitted that the acts of Bishonath amounted virtually to a grant to his brothers of one-third shares during their lives, but he denied that they amounted to more. In their Lordships' view, however, Bishonath admitted his brothers to the succession, intending them to have full, complete, and equal ownership of the estate with himself.

It was then contended for the appellant that, if this were so, it was an attempt to do what the Hindoo law would not allow.

It has already been stated that the acts of Bishonath and his brothers, on his father's death, afford strong ground for the belief that they did not regard the manner of succession, if it ever prevailed, in the light of a family-custom, but as an incident or condition of tenure which had been determined by the settlement, and consequently assumed that, thenceforth, the succession would conform to the ordinary law. Their conduct, indeed, goes far to disprove that a family-custom, properly so called, ever existed; but, assuming it to have once existed, their Lordships think it was of a nature which could, without any violation of law, be put an end to, and that it was, in fact, discontinued.

It was urged that this could not be done without the consent of the sovereign power, *viz.*, the British Government. There is no question, in the present case, of the maintenance of a raj or principality, or of a tenure differing in its general qualities from an ordinary estate under the British Government. Their Lordships are certainly not prepared to hold that descent on single male heirs was, after the settlement, a condition of the tenure on which this estate was held, requiring the assent of the sovereign power to a change in the manner of succession, and giving to the Government the right to resume the estate upon its violation. Their Lordships consider that, at the highest, no more has been alleged and proved in this case than a family-custom regulating the descent *inter se*, and which, if existing, the settlement, of itself, did not disturb.

It was also urged that the effect of the custom was to create successive life-estates in the heirs male of this family, analogous to a feudal entail, which could not be barred, and which prevented alienation, or any change in the manner of descent, which, it was contended, would be a virtual alienation.

It will be collected, from what has been already said, that their Lordships do not consider that such is, as a question of tenure, the nature of the estate; and in their view the family-custom alleged in this case has not this effect.

Their Lordships cannot find any principle or authority for holding that, in point of law, a manner of descent of an ordinary estate, depending solely on family-usage, may not be discontinued, so as to let in the ordinary law of succession. Such family-usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family-usages that they should be certain, invariable, and continuous; and well-established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion and abundant litigation, if the law attempted to revive and give effect to usages of this kind, after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon.

Their Lordships can have no doubt that, in this case, the special custom of descent, if it ever existed, was designedly discontinued after Raj Singh's death by Bishonath and his brothers, and that, in fact, the estate was enjoyed by the brothers and by their widows according to the ordinary law of succession, and on the footing that the custom was at an end—and not only that there was this enjoyment in fact, but that the parties were registered in the public registers, and suits were brought against third persons by the brothers and the widows, on the assumption that they were co-heirs and co-sharers of a joint family-estate.

Prankishen, the plaintiff in this suit, appears at one time to have been disposed to dispute what had been done, and to set up the special mode of descent; but in the suit brought by himself against the alleged adopted son of his uncle Juggernath, already referred to, he claimed the one-third of the estate which Juggernath held as his heir, and succeeded in setting aside the alleged adoption, and established his own right as heir to his uncle. He thus abandoned in that suit the custom which, in the present, he asserts to be still in existence. Supposing, therefore, that Prankishen had any inchoate right to the customary succession as the eldest son of Bishonath, their Lordships consider that the suit referred to affords proof of his ultimate adoption of what his father had done; and the presumption of acquiescence is strengthened by the fact that he did not prosecute the appeal in the suit brought by his father Bishonath, in which the custom had been negatived.

Their Lordships are glad to be able to uphold the judgment of the High Court, since, by doing so, they confirm the possession and enjoyment of this estate as it has existed since the death of Raj Singh, and maintain the order of succession which has, in fact, prevailed since the settlement in 1790.

In the view which their Lordships have taken of the case, it becomes unnecessary to consider the point that the suit was barred by the law of limitation of suits.

Their Lordships being of opinion, for the reasons above given, that the decree of the High Court ought to be upheld, will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

The 30th November 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo Law—Adoption—Misrepresentation—Estoppel—Pleading—New Case.

On Appeal from the High Court of Judicature, North-Western Provinces, Agra.

Gopee Lall

versus

Mussamut Sree Chundraolee Buhoojee.

As a man cannot, while he has an adopted son living, adopt another son; so neither can his widow, after his death, by virtue of any authority delegated from him, adopt a son while an adopted son is still living.

Defendants, who have represented the fact of an adoption, which they erroneously conclude to be an adoption valid in law, cannot be charged with misrepresentation so far as the fact is concerned, and are not estopped from setting up the true facts of the case.

Even if a plaintiff has been misled by various representations of the defendant into framing his suit in a particular way, still he can only recover according to his allegations and proofs, and cannot be allowed to set up an entirely new case not set up or hinted at in the plaint.

THIS was a suit brought to recover possession of a temple and certain jewels and valuables held therewith. The plaintiff claimed as heir of one Luchmunjee. He endeavoured to prove his heirship in this way. He asserted that his grandfather

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Damodurjee had two wives, Luchmee and Charmuttee; that, shortly before his death, he gave a power to his wives to adopt two sons; that, after his death, his first widow Luchmee adopted Gobindjee, the father of the plaintiff; that some four years afterwards, the second widow Charmuttee adopted Luchmunjee, through whom the plaintiff claims. The plaintiff asserts that on the death of Luchmunjee, who according to his case was his uncle, he became the heir to Luchmunjee, who was in possession of the property. He admits that the defendant, the widow of Luchmunjee, had a life-interest in the property, but he alleges that she had forfeited that life-interest by committing waste.

The Principal Sudder Ameen found, in effect, that the plaintiff had proved the whole of his case. The High Court reversed the decision of the Principal Sudder Ameen; they expressed themselves by no means satisfied that the defendant had forfeited the property by committing waste; but they deemed it unnecessary to decide this question, inasmuch as they came to the conclusion that the plaintiff had failed to prove his heirship to Luchmunjee. They were by no means satisfied that the plaintiff proved all the facts on which he relied; but they came to the conclusion that, assuming all those facts to be proved, as the plaintiff alleged them, still in point of law his case failed for this reason, that, according to Hindoo law, there cannot be two valid successive adoptions, and that the first widow having adopted a son, Gobindjee, the second widow could not, while Gobindjee was alive, make another valid adoption.

The question of successive adoptions was argued very elaborately, and very carefully considered in the case of Rungama *vs.* Atchama and others,* reported in the 4th volume of Moore's Privy Council Appeals, p. 1; and since the decision of that case, whatever doubts may have been entertained on the question before, it must be considered as settled law that a man cannot, while he has an adopted son living, adopt another son. And in their Lordships' opinion, it follows on principle that a man cannot delegate to others to be exercised after his death, any greater power than he himself possessed in his life-time; and that inasmuch as he (Damodurjee) could not, one adopted son being living, adopt another, his second widow Charmuttee could not, by virtue of any authority delegated from him, adopt a son while an adopted son was still living.

Their Lordships, therefore, concur with the judgment of the High Court, which amounts to this that, assuming all the plaintiff's facts, as he alleges them, in his own favor, still that, in point of law, the second adoption was invalid, and that, consequently, there was no relationship between him and the second adopted son Luchmunjee, under whom he claims.

That being so, their Lordships do not think it necessary to give an opinion as to whether the facts, on which the plaintiff relies, have been substantiated or not. Assuming them to have been substantiated, his case, in point of law, fails.

It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even asserting the law in their favor, inasmuch they have represented in former suits, and in various ways, by letters and by their actions, that Luchmunjee was the adopted son of Damodurjee adopted by Damodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee or the defendant on any matter of fact. They are alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was, in fact, adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties.

It may further be observed that, if Luchmunjee's statement is to be taken, it must be taken as a whole; and what he asserts is that he was validly adopted. But, if he was validly adopted, it follows that the plaintiff was invalidly adopted; and, therefore, in this view of the case, it appears to their Lordships that no reliance can be placed upon this question of estoppel.

It has, indeed, been further argued that, even putting it not so high as estoppel, still the plaintiff has been misled by various representations made by the defendant into framing his suit as it is now framed. If that were so, it would not empower their Lordships to depart from the rule which has always prevailed that a man must recover according to his allegations and his proofs.

* 7 W. R., P. C., 57.

It would not enable their Lordships to allow (as the appellant asks them to allow) an entirely new case to be now brought forward before them, which is not even set up, or hinted at, in the plaint.

The new case suggested appears to be that, assuming an invalid adoption of Luchmunjee, and treating Luchmunjee as a mere trespasser, still the plaintiff could recover by proof of his title from Damodurjee. Whether he has such a case or not, their Lordships do not think it necessary to decide, but they feel themselves bound to say that that case cannot be gone into, inasmuch as it has not been set up in the plaint. Their Lordships do not desire to construe plaints with any extreme strictness or technicality, but it would manifestly be extremly inconvenient, and certainly contrary to their practice, to allow a case to be raised here which is entirely different from the one which has been previously insisted upon.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and ought to be affirmed. Their Lordships understand the High Court simply to have ruled that the plaintiffs had failed to prove the title on which they sued, that the Principal Sudder Ameen's decree ought, therefore, to be reversed, and the suit dismissed with costs. But inasmuch as the formal decree, which simply orders that the appeal be decreed with costs, and the decision of the Principal Sudder Ameen reversed, may hereafter lead to some doubt as to what was really decided by the High Court, their Lordships think that the formal decree should be varied by ordering that the decision of the Principal Sudder Ameen be reversed, and the suit dismissed with costs in both Courts; and their Lordships will humbly advise Her Majesty to this effect. The appellants must pay the costs of this appeal.

The 12th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for Account—Commission under Act VIII. of 1859, s. 181—Investigation of Accounts—Witnesses—Evidence.

Case No. 45 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 7th December 1871.

Chand Ram (Defendant), *Appellant,*

versus

Brojo Gobind Doss (Plaintiff), *Respondent.*

Mr. M. L. Sandel and *Baboo Joy Gobind Sen* for Appellant.

Baboos Ashoolosh Dhur, Kalee Mohun Doss, and *Rujonee Nath Bose* for Respondent.

In a suit for an account of moneys received and disbursed by defendant while employed as a mohurir in plaintiff's shop, and for sums which defendant might be found to have misappropriated, defendant objected that one D (a relative of plaintiff's), who had been jointly employed with him as manager, with equal powers and responsibilities, ought to have been sued together with him:

HELD that, to release D on payment of a trifling sum, and to sue defendant alone for a large amount (as plaintiff had done), no accounts being taken between them, was most inequitable, and the suit should have been dismissed:

HELD that, as plaintiff had filed his khatta-books in Court, and did not allege that they had been falsified, he should have balanced the account himself, and the lower Court should not have deputed an Ameen under Act VIII. of 1859, s. 181, to investigate the accounts:

HELD that such investigation does not include or allow the taking of the depositions of witnesses; and such depositions are not legally admissible as evidence in the cause.

Glover, J.—THE plaintiff in this case sued the defendant, a mohurir employed in his shop at Bundur Bazar, for an account of moneys received and disbursed by him whilst so employed, and also for such sums, estimating them at Rs. 2,500, as he might be found to have misappropriated.

The amount claimed was afterwards, with the permission of the Court, raised to Rs. 5,101-15-8-5, and the plaint, with stamp, amended accordingly.

The defendant objected in the first place to the form of suit, alleging that he and one Raj Coomar Dass, a relative of the plaintiff, were jointly employed as managers of the shop, with equal powers and responsibilities, and that both ought to have been sued together. He added that the plaintiff had improperly released RajCoomar from liability, because he was his relation, and was trying to saddle defendant with the whole burthen.

He further objected that persons in his position of salaried mohurir were not liable to be called on to give in detailed accounts; that the accounts of sales, &c., were made up daily, and had been submitted in due course to the plaintiff; that there was little or no profit from the trade; and that when he was discharged by the plaintiff on the 3rd Srabun 1277, the whole stock of cloth and

cash, Rs. 5,879-13 worth of the former, and Rs. 185-10, was made over to the newly-appointed gomashta, Ram Surun Chowdhry, plaintiff's brother-in-law.

The Subordinate Judge deputed an Ameen under section 181 of the Code of Civil Procedure to investigate the plaintiff's accounts, and decided, first, that the defendant Chand Ram was in sole charge of the plaintiff's shop and solely responsible, Raj Coomar being an inferior clerk only; and, secondly, that the Ameen's investigation showed a considerable deficit in his accounts, together with sundry false credits and debits. The Subordinate Judge went into this latter question at some length, and gave a decree to the plaintiff for Rs. 4,047-12-5-1-15.

The points which have been argued before us in this appeal (the merits of the case not being gone into) are:—

(1.) Whether a suit like the present will lie against Chand Ram only, his co-servant Raj Coomar not having been made a defendant?

(2.) Whether the Subordinate Judge was entitled to receive as evidence the depositions of the witnesses who had given evidence before the Ameen?

The plaintiff alleges that Raj Coomar was only an inferior mohurir, with no power of management and with no responsibility; the defendant, that he was his (defendant's) fellow clerk, enjoying the same salary and exercising the same powers of purchasing and selling cloth.

We have had the evidence on this point read, and think that it greatly preponderates in favor of the defendant's contention. Of the four witnesses examined by the plaintiff, two describe Raj Coomar as subordinate to Chand Ram, without in any way entering into detail or pointing out in what the inferiority consisted. The third, whilst saying that Chand Ram had the more authority, admits that their position was equal. The fourth states distinctly that the two were equal in salary, position, and authority. The defendant's witnesses, who are many in number, say the same thing, and the plaintiff himself, although he now denies their equality, very clearly admitted it when a suit was brought against him by Nimayenund. In his answer to that suit, Brojo Gobind Doss alleged that the shop was in the joint charge of Chand Ram and Raj Coomar; that they both had authority to buy and sell, to spend money, and make out accounts. In this case, also, the receipt taken by plaintiff from Raj Coomar, and filed by the defendant, shows that Raj Coomar was not the mere salaried mohurir he is now alleged to be. That receipt speaks of money due from Raj Coomar on account of the "tuhveel," and acknowledges that the balance has been paid. The Subordinate Judge says that this receipt was on account of an excess of salary drawn by Raj Coomar. We think otherwise, and that it most clearly refers to shop-transactions carried on by Raj Coomar, and on account of which there was a balance due to his employer.

On the whole evidence, we are of opinion that Raj Coomar was not a mere mohurir, but was associated with Chand Ram in the management of the shop, and was equally responsible with him.

And that being so, it follows that he ought to have been associated with him in this suit. The accounts to be investigated extended over some years, from 1274 to 1277, during the first two of which Raj Coomar was as much concerned with them as the defendant Chand Ram; and to release Raj Coomar from the suit on pretence of being satisfied, without taking any account of the transactions managed by the two servants whilst jointly occupied in conducting the shop-business, was manifestly a most unfair proceeding towards Chand Ram. If the two were, as we consider they were, jointly responsible, then to release the one on payment or pretended payment of a trifling sum, and to sue the other for upwards of Rs. 5,000, no accounts being taken between them and no arrangement made for testing their different responsibilities, was most inequitable.

We are of opinion that the plaintiff's suit should have been dismissed on this ground. We think it right, however, to make some remarks on the way in which the Subordinate Judge has applied the provisions of section 181 of the Code of Civil Procedure. In the first place, we think that this was not a case in which a Commissioner should have been appointed at all. The plaintiff filed his khatta-books in Court; and as he nowhere alleged that they had been in any way falsified by the defendant, he could have made up the account from them, without troubling the Court in the matter, and have fixed the amount due to him from the defendant, instead of stating a sum by guess. It never seems to have struck the Subordinate Judge as an unusual proceeding on the part of the plaintiff, that, being provided with account-books the entries in which were undisputed by him, he should have asked the Court to

balance the account for him, instead of making up the total himself.

Secondly, the Subordinate Judge, in deciding the question of "false credits and debits," has relied on the evidence of witnesses examined by the Ameen, and sent up with his report. Now, section 181 of the Code of Civil Procedure does not seem to give an Ameen authority to take evidence on solemn affirmation, and in any case such evidence does not by that section become evidence in the cause. In section 180, it is distinctly stated that the depositions of witnesses are to be recorded and used by the Judge as evidence. In section 181, the word "depositions" is not to be found, and it is the "proceedings" only of the Commissioner, *i. e.*, his report or opinion, which are to be received as evidence. The wording of the next section (182) also shows that an investigation into accounts does not include or allow the taking of the depositions of witnesses. In this case the Ameen, although admitting that he had not gone through the various items of debit and credit in the khatta-books owing to want of time, seems to have hunted up persons whose names were entered therein on account of sundry transactions in cloth, and to have examined them touching their business-transactions with the plaintiff's shop; and finding in some instances that their account of matters did not agree with the entries in the khatta-books, at once jumped to the conclusion that the defendant Chand Ram had made false entries, and misappropriated the proceeds. The Subordinate Judge accepted this evidence, and acted upon it, although its effect was to invalidate the correctness of the very khatta-books which the plaintiff had put in as the basis of his claim. The evidence of the witnesses taken by the Ameen was not legally receivable, and the Subordinate Judge ought not to have been influenced by it. That he was so, and that he was generally prejudiced against the defendant, is clear from the wording of his judgment throughout. Thus, he speaks of the receipt given by Raj Coomar, and filed by the plaintiff as not being proved, whereas the plaintiff himself had in his deposition admitted it. He gives it as his opinion that the defendant Chand Ram has brought himself within the clauses of the Penal Code, and declares that "he sees no crime which the defendant is not capable of committing," and this on the strength of supposed false entries in books which the plaintiff has filed as true!

It has been contended, though faintly, that in any case the defendant is liable for the time between the dismissal of Raj Coomar and the 2nd Srabun 1277; and under ordinary circumstances he might be; but the extremely disingenuous way in which the plaintiff has brought his case, and his endeavour to conceal the real position of Chand Ram and Raj Coomar, make any further enquiry impossible.

Without, therefore, going into the merits of the case, we reverse the decision of the Subordinate Judge, on the point of law, and dismiss the plaintiff's suit with all costs.

The 13th December 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex, *Judge*.

Plaint—Cause of Action.

Appeal from an order of the Hon'ble A. G. Macpherson, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Dorab Ally Khan (Plaintiff), *Appellant*,

versus

Khajah Moheeooddeen (Defendant), *Respondent*.

The Officiating Advocate-General and *Mr. Kennedy* for Appellant.

No one for Respondent.

A plaint which had been rejected, admitted on appeal, leave being reserved to defendant, if so advised, to apply to have it taken off the file.

THIS was an appeal from an order rejecting the plaint dated the 5th of September. The order is as follows: "If I had been of opinion that this plaint disclosed a good cause of action, I should have granted the prayer for leave under section 13 of the Letters Patent to sue in this Court. I shall, therefore, grant the leave (notwithstanding the order I am about to make) so that the plaintiff may have it in his power to appeal, if he should be so advised. But I reject the plaint under section 32 of the Civil Procedure Code, because it appears to me 'that the subject-matter of the plaint does not constitute a cause of action.' The case of Sowdaminee Chowdrain *vs.* Kishen Kishore Poddar,* decided

* 12 W. R., F. B., 8.

by a Full Bench (4 B. L. R., F. B., 11), bears upon this question. It is to be noted, too, that the plaintiff states that under his purchase he got possession, and made collections exceeding Rs. 10,000 in amount, though he was afterwards evicted. The plaint was presented to me on the 2nd instant."

The plaint stated that Abdoos Samut and Woozer Khan, deceased, were, at the time of the death of Woozer Khan, possessed of certain estates and interests in certain lands situated in Lucknow, in Oudh; that, on the 18th of June 1866, a writ of *fieri facias* was, on the application of Khajah Moheeooddeen, issued by the High Court of Judicature at Fort William in Bengal, in its ordinary original civil jurisdiction, in the cause in which Khajah Moheeooddeen and another were the plaintiffs, and Abdoos Samut and others, the heirs and representatives of Woozer Khan, were the defendants, directed to the Sheriff of Calcutta, "commanding him to cause to be levied and made of the houses and lands, debts and other effects, moveable and immoveable, of the defendants within the provinces, districts, or countries of Bengal, Behar, and Orissa, or in the province of Benares, or any other factories, districts, and places which then were annexed to and made subject to the Presidency of Fort William in Bengal, by seizure, and, if necessary, by sale thereof," the sum mentioned in the writ; that the Sheriff of Calcutta by the authority of Khajah Moheeooddeen, and on the express instructions of his attorney, and professing to act under and by virtue of the writ seized, on the 2nd and 20th days of August 1866, the right, title, and interest of Abdoos Samut and Woozer Khan in the said lands; that the Sheriff sold, on the 4th of October 1866, after the usual advertisements, the right, title, and interest of Abdoos Samut and Woozer Khan of, in, and to the said lands to Dianut-ut-Dowla for the sum of Rs. 26,000; that a bill of sale was executed on the 9th of October, and, at the time of the delivery of the bill of sale, the whole of the purchase-money was paid to the Sheriff; that on or about the 12th October 1866, the Sheriff paid the sum of Rs. 5,000 to the attorney of Khajah Moheeooddeen, and, on the 25th of October 1867, paid the balance of the purchase-money, after deducting his charges, to the defendants in that suit; that the Sheriff put Dianut-ut-Dowla into possession of the property purchased by him; that, by an order No. 868, dated the 26th of August 1868, the Judicial Commissioner of Oudh declared the sale to be null and void, and in or about the same month, Dianut-ut-Dowla was ejected; that Dianut-ut-Dowla died on the 23rd of June 1868, having made a will, by which he appointed Dorab Ally Khan, the plaintiff, to be his executor. The plaintiff ought to recover from the defendant the sum of Rs. 26,000 for moneys had and received by Khajah Moheeooddeen for the use of Dianut-ut-Dowla.

The Officiating Advocate-General, on behalf of the appellant, contended that, when this writ of *fi. fa.* was issued, the High Court had no authority to levy execution in Oudh, and the decree-holder, in setting the Court in motion, was liable for the consequences. The general rule regarding the liability of the Sheriff and of the judgment-creditor is laid down at page 90 of Vol. I., Chitty's Pleading. The Full Bench case referred to by Mr. Justice Macpherson was a proceeding under Regulation VII. of 1825 (and not under Act VIII. of 1859), and is in support of the plaintiff's contention, as the sale in this case was set aside by the Judicial Commissioner of Oudh. The case of Brojendur Roy Chowdhry *vs.* Juggurnath Roy (6 Weekly Reporter 147) was under Act VIII. of 1859, and there, the sale having been set aside, it was held that the right of the purchaser to recover his purchase-money was absolute. In the case of the Bank of Hindustan *vs.* Premchand Raichand (5 Bom H. C. Rep., 83) at page 96, Sargent, J., speaking of this 258th section, says: "That section, in my opinion, being general in its terms, applies to all cases in which the sale is set aside, and not merely when it is set aside by reason of some irregularity in the proceedings." This was a case which ought to have been argued, and not disposed of, by the learned Judge on the presentation of the plaint.

The Chief Justice stopped the Advocate-General, and stated that there seemed to be enough to admit the plaint. The defendant was to have liberty, if so advised, to apply to have the plaint taken off the file, when the matter could be argued. The plaint was accordingly received and filed.

The 14th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Court Fees—Suit for Declaratory Order with Confirmation of Possession.

Regular Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 16th July 1872.

Bohuroonissa Bibee (Defendant), *Appellant,*

versus

Kureemoonissa Khatoon (Plaintiff), *Respondent.*

Baboo Kashee Kant Sen for Appellant.

No one for Respondent.

In a suit for a declaratory order to set aside a summary order under Act VIII. of 1859, s. 246, where plaintiff asked also for an order "confirming possession after declaration of title," it was HELD that consequential relief was sought, and the stamp-fee leviable was the *ad-valorem* fee prescribed by the Court Fees Act.

Note by the Deputy Registrar.—THE lower Court, in its order from which this appeal is preferred, states that the suit was to establish the plaintiff's right to certain property named in the plaint, and to have her possession confirmed; and that her claim was based on a deed of sale in lieu of dower (hibba-bil-ewuz) executed in her favor by her husband.

The *suit* was valued at Rs. 9,560, and the stamp-fee levied from the plaintiff in the lower Court was Rs. 450, instead of Rs. 455 provided by law.

In the grounds of appeal, however, the appellant endeavours to make out, for the purpose of the stamp-fee now leviable, that the suit ought to have been "for setting aside the lower Court's order under section 246 (Act VIII. of 1859) after declaration of title," which, it is asserted, "is tantamount to a suit for confirmation of possession after declaration of title;" and that, consequently, under the Court Fees Act, the fee leviable is Rs. 20, *viz.*, Rs. 10 for the portion of the claim in which it is sought to have the summary order set aside, and Rs. 10 for the portion in which a declaration of title is sought.

This amount (*viz.*, Rs. 20) has consequently been paid in as the fee leviable in this appeal. But the Court Fees Act (clause 3, article 17, Schedule II.) provides a stamp of Rs. 10 in suits for "a declaratory decree, *where no consequential relief is prayed.*"

In the suit in question consequential relief *was* apparently sought, as the plaintiff did not simply ask for a declaratory order to set aside the summary order of the lower Court under section 246, but also for an order "confirming possession after declaration of title;" and hence she properly paid the *ad-valorem* fee which, it is presumed, is also leviable in this appeal, instead of that which has been paid in, *viz.*, Rs. 20.

Order.

Kemp, J.—We think that the view taken by the Deputy Registrar is correct. The petitioner is directed to pay the proper stamp.

The 14th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Adoption—Landlord and Tenant—Limitation—Deduction.

Case No. 687 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 5th January 1872, affirming a decision of the Subordinate Judge of Beauleah, dated the 19th June 1871.

Huronath Roy Chowdhry (Defendant), *Appellant,*

versus

Golucknath Chowdhry (Plaintiff), *Respondent.*

Mr. J. T. Woodroffe and *Baboos Sreenath Doss* and *Mohinee Mohun Roy* for Appellant.

Baboos Romesh Chunder Mitter and *Doorga Mohun Doss* for Respondent.

In a suit for rent, where plaintiff sued as the adopted son of the deceased landlord, and defendant (who was the adopted son of the deceased tenant, and in possession) denied the relationship of landlord and tenant between the parties:

HELD that, as plaintiff's adoption had been declared by a competent Court, the mere fact of an appeal to the Privy Council did not alter his position as the successor to the right of her who was landlord of the deceased tenant, and of defendant who succeeded to that tenant's rights; and that although plaintiff had not received rent for many years, and had endeavoured to eject the defendent, yet that did not get rid of the fact that he stood in the shoes of the deceased landlord, and was in that relation to the defendant:

HELD that the landlord in the circumstances of this case could not be allowed deduction, in respect of the plea of limitation, for the time he was suing the tenant as a trespasser, because he must have known of defendent's right to hold as a tenant; such deduction being only allowable where the landlord's action was *bonâ fide.*

Glover, J.—THE plaintiff in this case sued the defendant for the rent due on 26 mehals for the years 1271 to 1277 B. S.

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The substantial defence was that there existed no relationship of landlord and tenant between the parties, and that no suit for rent would lie.

The Judge, confirming the order of the Subordinate Judge, gave the plaintiff a decree for three years' rent, holding the rest of the claim to be barred by the law of limitation.

Against this decision, both parties appeal: the defendant on the general issue, the plaintiff, because he has only been allowed three years' rents instead of seven.

It appears that, as between Rajmoyee Chowdhrain, the adopting mother of the plaintiff, and Roop Moonjuree Chowdhrain, the adopting mother of the defendant, a solehnama was executed in Bhadur 1244 B. S., whereby the latter got possession of a certain portion of the estate, paying a fixed rent of sicca Rs. 165 per annum, and during Roop Moonjuree's lifetime, rent was admittedly paid to Rajmoyee Chowdhrain in accordance with the solehnama. Since Roop Moonjuree's death, the defendant, her son, has refused to continue the payments to the plaintiff, the son of Rajmoyee Chowdhrain, on the ground that the latter has not been legally adopted.

There have already been suits between the two: One, by the present defendant to set aside the plaintiff's adoption by Rajmoyee, in which he failed, and which is now before the Privy Council in appeal. The other, by the present plaintiff to eject defendant from the mehals, and to recover mesne-profits, was dismissed on the ground that, by the terms of the solehnama, the son of Roop Moonjuree was entitled to retain possession.

Mr. Woodroffe for the defendant, appellant, contends that there exists no relationship of landlord and tenant between his client and the plaintiff; that ever since Roop Moonjuree's death, the possession has been adverse, and no rent has been paid, and that the plaintiff, by his action in the regular suit for possession, as well as by the prayer of his plaint in this suit, has admitted that the defendant is not his tenant.

I think the argument untenable. There is no doubt that, during her lifetime, Rajmoyee was the landlord of Roop Moonjuree, and that the latter acknowledged her tenancy, and paid the rent reserved. The plaintiff has been pronounced by a competent Court to be the adopted son of Rajmoyee (meaning by that, adopted by her in conformity with the directions of her deceased husband), and as such, succeeds to the position occupied by his adopting mother. The mere fact of an appeal having been preferred to Her Majesty in Council does not in any way alter that position; and if his adopting mother was Roop Moonjuree's landlord, and consequently of the person who succeeded to Roop Moonjuree's rights, so would be the plaintiff after he had succeeded to Rajmoyee's rights. I think that so long as the decision declaring the plaintiff to be the son adopted by Rajmoyee stands, the plaintiff must be considered as the landlord of the defendant.

It is quite true that the plaintiff has not received rent for many years, and that he endeavoured by suits to eject the defendant from the mehals, and to get khas possession with mesne-profits; but this does not get rid of the fact that, up to the present moment, at all events, the plaintiff stands in the shoes of Rajmoyee Chowdhrain, and is as much the landlord of the defendant as Rajmoyee was of Roop Moonjuree; and if the landlord, then the relationship objected to exist, and no length of time would bar. It is not as if the defendant had held these lands adversely as of his own separate right. His claim to hold them without paying rent to the plaintiff depends on his being able to prove to the Privy Council that the plaintiff is not the representative of Rajmoyee, in which case he (defendant) would by inheritance succeed to the entire estate.

I think, therefore, that the special appeal of the defendant must be dismissed with costs.

In the cross-appeal of the plaintiff, Baboo Romesh Chunder Mitter argues that his client is entitled to the rent accruing within three years of the date of his cause of action; that his cause of action to recover rent from the defendant did not accrue till the decision of the High Court in the suit of 1868, declaring him bound by the solehnama, and that, therefore, he is entitled to all the claims.

On this point also, I agree with the Court below. A landlord may, under certain circumstances, be allowed a deduction, when limitation is pleaded for the time he was suing a tenant as a trespasser—Ishan Chunder Roy *vs.* Khajah Asanoollah (17 Weekly Reporter 79); but the landlord's action must in that case be *bonâ fide*, and he must have brought his suit for ejectment in the full belief that the defendants were trespassers. In this case when the position of the two adopted sons is considered, and the circumstances in which the one stood to the

other, it is impossible to believe that the plaintiff was not perfectly aware both of the existence and of the authenticity of the solehnama under which, the defendant, in right of his adopting mother Roop Moonjuree, held as a tenant. Looking to all the circumstances of the case, I have no doubt that he did perfectly know the position of the defendant, and that his object was, if possible, to destroy it.

The cross-appeal is dismissed with costs.

Kemp, J.—I concur in dismissing these two appeals.

The 15th December 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex, *Judge*.

Jurisdiction—Mala-fide Claim—Small Cause Court, Calcutta—Act IX. of 1850, s. 28—Act XXVI. of 1864, s. 2.

Reference to the High Court under section 7 of Act XXVI. of 1864, by the First and Second Judges of the Calcutta Court of Small Causes.

Bonomally Nawn, *Plaintiff*,

versus

T. Campbell, *Defendant*.

Mr. Kennedy for Plaintiff.

Mr. Apcar for Defendant.

Having regard to the provisions of section 28, Act IX. of 1850, and section 2, Act XXVI. of 1864, the Small Cause Court at Calcutta has no jurisdiction in a case in which the plaintiff, in order to give jurisdiction to the Small Cause Court, claims as damages sums which by law he cannot recover, which he cannot be entitled to at all, and adds them to his claim for that purpose.

Reference.—The question which arises in this case has reference to the Court's jurisdiction.

The provisions as to jurisdiction contained in Act IX. of 1850 (the original Small Cause Courts' Act) are not identical with those contained in Act XXVI. of 1864 (the Small Cause Court Extension Act).

By section 28, Act IX. of 1850, "all persons shall be deemed within the jurisdiction of the Court, who dwell or carry on their business, or work for gain, within the district of the Court at the time of bringing the action, or who did so dwell or carry on their business, or work therein at the time when the cause of action arose, or within six months before the time of bringing the action for causes of action which arose within the same time."

By section 2, Act XXVI. of 1864, "the jurisdiction of the Courts held, or to be held under the said Act IX. of 1850, shall extend to the recovery of any debt, damage, or demand exceeding the sum of Rs. 500, but not exceeding the sum of Rs. 1,000, and to all actions in respect thereof, provided that the cause of action shall have arisen, or the defendant, at the time of bringing the action, shall dwell or carry on business, or personally work for gain within the local limits of the jurisdiction of the Court."

From those sections it will be seen that while in claims for sums under Rs. 500, this Court has jurisdiction only in respect of the defendant dwelling, working, or carrying on business, within the district of the Court; in claims for sums exceeding Rs. 500, this Court has an alternative jurisdiction by reason merely of the cause of action having arisen within the local limits of its jurisdiction without reference to the place where the defendant may be dwelling or working.

The case now under reference, which, on the face of it, purports to be a suit for the recovery of a sum over Rs. 500, was originally tried by the First Judge of the Court who found that the plaintiff's cause of action had arisen within the local limits of the Court's jurisdiction.

It was, however, found that the plaintiff was only entitled to recover a sum considerably under Rs. 500, and that the balance of his claim had been thrown in in order to bring his claim within the extended jurisdiction conferred by section 2, Act XXVI. of 1864, in cases where the cause of action has arisen within the local limits of the Court's jurisdiction.

The First Judge also found that the defendant was not subject to the jurisdiction of his Court on any of the grounds set forth in section 28, Act IX. of 1850; and, being of opinion that the case, as being in reality a claim for less than Rs. 500, fell properly within the provisions of that section, held that he had no jurisdiction to try it.

On a motion before two Judges for a new trial, it was contended for the plaintiff that, inasmuch as the amount which the plaintiff sued to recover was over Rs. 500, the case fell within section 2, Act XXVI. of 1864; and that the First Judge was wrong in holding that he had no jurisdiction to try it. In

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upport of this view, the case of Sikhurhund *vs.* Sooringmul (1 Hyde's Reports 72), in which a similar question, arising under section 12 of the Letters Patent, in respect of the jurisdiction of the High Court had to be determined, was brought to our notice.

We were, however, unable to accept the view that a claim which was not properly within our jurisdiction could be brought within it by adding to it a further claim not made in good faith. We, consequently, rejected the application for a new trial.

With reference to the concluding remarks made by Mr. Justice Wells in the case referred to, in which he attributes to the High Court the power of adequately reimbursing a defendant against whom an excessive claim has been brought in bad faith, it is to be observed that where a judgment is passed by this Court in favor of a plaintiff for any part of his claim, no power is given for compensating a defendant. But as the decision cited, in which Mr. Justice Wells is reported to have stated that he had the concurrence of the late Chief Justice in the view he expressed, raises in our minds a doubt as to the correctness of our opinion, we have deemed it right to refer the matter for the opinion of the Judges of the High Court.

Mr. Kennedy (for plaintiff).—This suit was brought in the Court of Small Causes to recover the sum of Rs. 557-5-6 as damage sustained by the plaintiff. One C. Betts assigned certain flour mills to the defendant. The assignment contained a proviso for redemption, and in default of Betts redeeming, the defendant was to be at liberty to sell the mills. Betts failed to redeem within the time, and the defendant sold the mills to the plaintiff, entering into a bond, the condition of which was that, in the event of the plaintiff, his heirs, representatives or assigns being interrupted in the quiet enjoyment of the mills by Betts or any one lawfully claiming through him, the defendant should forfeit the penalty named in the bond. At the time of the sale to the plaintiff, and the making of the bond, execution had issued in a certain suit against Betts, and the mills were seized in execution. This action was then brought on the bond. [*The Chief Justice.*—We are to give our opinion on the case as it is referred to us; the bond is no part of that case, and we cannot go into it.] It is extremely inconvenient to decide this case without going into the terms of the bond. Act XXIV. of 1864, section 2, extends the jurisdiction of the Court of Small Causes to suits for the recovery of "any debt, damage, or demand exceeding the sum of Rs. 500, but not exceeding the sum of Rs. 1,000." The "demand" here exceeds Rs. 500, and the Court had jurisdiction to entertain the suit, and to make a decree for a less amount if, on trial, it was found that the plaintiff was not entitled to recover the full amount of his claim. It was so held in Sikhurchunder *vs.* Sooringmull (1 Hyde's Rep. 272), where a similar question was raised under section 12 of the Letters Patent of 1862. [*The Chief Justice.*—That was a case of unliquidated damages] The present case is also one of unliquidated damages. [*The Chief Justice.*—A claim for a larger amount than the plaintiff is entitled to recover made simply to bring the suit within the Court's jurisdiction, would not give jurisdiction.] Act IX. of 1850 and Act XXIV. of 1864 are to be read together. The latter Act extends the jurisdiction of the Court with respect to the amount merely; under the former, the Court would have had jurisdiction to entertain suits for less than Rs. 500. [*Mr. Apcar.*—The contrary has been laid down in Lazarus *vs.* Victor (2 Hyde's Rep. 258), which has always been followed.] The claim was made in good faith, and it was not until certain of the items making up the claim were disallowed at the hearing that the amount fell below Rs. 500.

[By consent of the parties, the bond and a letter of demand from the plaintiff's attorney to the defendant's attorney, containing the particulars of the claim, were admitted and considered as part of the case referred.]

Mr. Apcar.—The amount the plaintiff is entitled to recover being less than Rs. 500, the Court of Small Causes has no jurisdiction to entertain this suit as the defendant does not reside in Calcutta—Lazarus *vs.* Victor (2 Hyde's Rep. 258). A fictitious claim for damages to increase the amount of the suit for the purpose of giving the Court jurisdiction does not give jurisdiction —Mootoo *vs.* Verapah Chetty (17 W. R. 243).

Judgment of the High Court.

Couch, C.J.—It is stated in the case which has been sent to us that the suit, which, on the face of it, purports to be a suit for the recovery of a sum over Rs. 500, was originally tried by the First Judge of the Small

Cause Court, who found that the plaintiff's cause of action had arisen within the local limits of the Court's jurisdiction.

It was, however, found that the plaintiff was only entitled to recover a sum considerably under Rs. 500; and that the balance of his claim had been thrown in in order to bring his claim within the extended jurisdiction conferred by section 2, Act XXVI. of 1864.

The First Judge also found that the defendant was not subject to the jurisdiction of the Court, on any of the grounds set forth in section 28, Act IX. of 1850; and, being of opinion that the case, as being in reality a claim for less than Rs. 500, fell properly within the provisions of that section, held that he had no jurisdiction to try it.

I think taking this finding in connection with the matters which have been brought before us, and it is agreed are to form part of the case, *viz.*, the summons, the particulars of the demand contained in the letter, and the bond, that this finding means that the plaintiff, in order to give jurisdiction to the Small Cause Court, claimed as damages sums which by law he could not recover, which he could not be entitled to at all, and added them to his claim for that purpose. In such a case as this, I think the Small Cause Court has not jurisdiction. The plaintiff could not give jurisdiction merely by adding to his claim sums which he could not, under any circumstances, be entitled to recover. The decision of Mr. Justice Wells in the case referred to is quite in accordance with this view, because it is stated there that the suit "was a suit to recover Rs. 848-12 for damages from the defendants, who had failed to fulfil their contract;" and the learned Judge said that "the plaintiffs had, owing to the evidence adduced by them being defective, failed to prove that they had sustained damages to a larger amount than Rs. 75." The case was not that they had put forward a claim for damages which they could not properly recover; but the evidence being defective, they could not succeed in getting more than Rs. 75; and the learned Judge held that, in such a case, the Court had jurisdiction under the words in the Letters Patent (section 12), "in which the debt, or damage, or value of the property sued for, does not exceed Rs. 100." There the suit was *bond fide* brought for a sum exceeding Rs. 100, and the jurisdiction of the Court could not be taken away, because the evidence was defective. Th other part of the judgment, as to the suit bein brought in bad faith, and the Court being abl to compensate the defendant by awarding cos against the plaintiff, was extra-judicial. Th Courts having such a power does not affect i jurisdiction. Has the plaintiff in this ca increased his claim by adding to it an amou which could not be included in it? If he ha he ought not to be allowed by so doing t give the Small Cause Court jurisdiction, an we must say that, in such a case as that, th Small Cause Court has no jurisdiction. A the plaintiff has done that, and has taken th opinion of this Court on the doubts whic arose in the minds of the Judges of th Small Cause Court, we must say that M Kennedy's client must pay the costs of re serving this case for the opinion of this Cou

Sikhurchunder *vs.* Sooring Mull, 1 Hyde 272.

The 18th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainsli

Judges.

Unregistered Documents—Evidence—Objections—Costs.

Case No. 206 of 1872.

Special Appeal from a decision passe by the Officiating Additional Judge of Patna, dated the 17th July 1871, modifying a decision of the Subordinate Judge of that District, dated the 11th April 1871.

Oomatool Fatima (Plaintiff),
Appellant,

versus

Ghunnoo Singh and others (Defendants),
Respondents.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Appellant.

Mr. R. E. Twidale and *Baboo Nil Madhub Bose* for Respondents.

Lower Appellate Court was held to have done g in giving effect to an unregistered bond which, ason of its not having been registered, was not ible as evidence under the provisions of the Indian tration Act, even though it was not specifically ted to in either of the Courts below.

e party, however, who succeeded on the footing of bjection in special appeal, was held not entitled to osts of such appeal, because he had omitted to the objection at an earlier stage.

Phear, J.—THIS is a redemption-suit in ich the plaintiff is the assignee of the inal mortgagor. He complains that the er Appellate Court has made it a condi- of redemption that he should pay a d made by the original mortgagor to ure the sum of Rs. 171, which bond not registered according to the provisions section 17 of the Indian Registration Act. section 17, a document securing a sum upwards of Rs. 100 is directed to be istered; and section 49 says that "No strument required by section 17 to e registered shall be received in evidence any Civil proceeding in any Court, or hall be acted on by any public servant as efined in the Indian Penal Code, or shall fect any property comprised therein, nless it shall have been registered in ccordance with the provisions of this ct."

The Lower Appellate Court has, in this tance, given effect, as against the property ght to be redeemed, to the unregistered d for an amount greater than Rs. 100.

Baboo Nil Madhub Bose and Mr. Twidale the respondent have not, in fact, disputed t this bond does fall within the literal ms of section 49 of the Registration Act, t they urge that the objection now made the appellant was never made in either the Courts below, and, therefore, ought t to be entertained by this Court on special peal; and in support of this contention, y have quoted a case reported in 9 eekly Reporter, page 493, and I believe there are other cases in the reports of a tenor similar to that of the decision in that case.

But here we observe that whether or not the objection was made in terms in either of the Courts below, the Lower Appellate Court had the fact distinctly before it that this document was an unregistered document. It is not suggested for a moment that any evidence could have been brought to throw doubt upon that fact. Indeed, it is admitted by the respondents' pleaders that the document is not registered. This being so, I think that the principle enunciated in the case which has been quoted, a principle which is a most wholesome one, is not applicable to the present case. The Judge was clearly aware that the document was not registered, and he ought to have borne in mind that such a document was forbidden by the Legislature to be taken into consideration in any suit for the purpose of affecting any property to which it applies.

With these views I think that the judgment of the Lower Appellate Court was wrong to the extent of Rs. 171. It ordered the plaintiff to pay for the purposes of redemption a sum too great by that amount. At the same time I think it is also clear that this objection, which has now been successful, was not specifically taken in either of the lower Courts; and that it was entirely the fault of the present appellant that it was not so taken. I apprehend that, if the plaintiff had really brought this objection to the notice of the Lower Appellate Court, he would have at once got the benefit of it, and, therefore, there would have been no need whatever to come up to this Court in special appeal. So far, therefore, as he succeeds on the footing of this objection, I think he is not entitled to the costs of this Court.

He has further objected to the decision of the Lower Appellate Court that he ought not to have been made to pay the whole costs of the defendant in the suit. But he is obliged, I think, to admit that, up to the time of the decision of the Lower Appellate Court, he had not tendered to the defendant the full amount of the money, which it was necessary for him to tender before he could be entitled to recover the property for which he sued. The defendant was, therefore, it seems to me, quite justified in defending the suit in the Lower Appellate Court, and he could not defend the suit by halves or by parts. He could only say, you are not ready to pay me

all the money to which I am entitled before you can compel me to give up my hold on the property. For this reason, it appears there is no fault to find in the decree of the Lower Appellate Court with regard to costs.

Therefore, I am of opinion on the whole that the decree of the Lower Appellate Court should be simply modified to the extent of diminishing the redemption-money by the amount of the non-registered bond, and that each party should bear his own costs in this Court.

Ainslie, J.—I concur.

The 20th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Contribution—Joint Obligation—Co-sharers—Cause of Action.

Case No. 260 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 18th July 1871.

Ram Pershad Singh and others (Defendants), *Appellants,*

versus

Nirbhoy Singh and others (Plaintiffs), *Respondents.*

Mr. C. Gregory and *Baboos Kalee Mohun Doss* and *Chunder Madhub Ghose* for Appellants.

Mr. R. T. Allan and *Baboos Mohesh Chunder Chowdhry* and *Nil Madhub Sen* for Respondents.

Three brothers carrying on business jointly borrowed money from one G M. after which one of them died, and the survivors (plaintiff and T), for the purpose of making up the consideration-money of certain property purchased, borrowed a further sum from G M and executed a bond to secure re-payment of all these sums. The property was purchased, and joint possession obtained. Subsequently plaintiff and T separated after executing each to each certain ikrarnamas by which each undertook to pay his share of the joint debt. The bond-holder then sued plaintiff and the representatives of T, and obtained a decree against plaintiff only, who, upon the decree holder being about to sell the property, sued the representatives of T for a moiety of the debt. Defendants objected that as plaintiff had not paid the decretal money, no cause of action had accrued.

HELD that the objection was good, and that plaintiff had no right to come into Court, and ask to be paid by his co-sharers before he had done anything himself, even to discharge his own portion of the obligation:

HELD, also, that, as defendants had been acquitted by a competent Court of all obligation to pay the original creditor, plaintiff's only right (if any) was to call upon them to pay himself, and this he could not do, until he could show that he had done something on their behalf.

HELD (by Phear, J.) that, if plaintiff could have alleged that his own separate property was mortgaged by the bond, at the request of T, that the money borrowed was applied with T's sanction to the benefit of the joint property, and that, afterwards, the brothers separated and divided the joint property, his plaint would have disclosed a good ground to maintain an equity on his part to call upon T's representatives to help in the proportion of his share in redeeming the mortgage.

Phear, J.—THE plaint in this suit states that the petitioner, Tundun Singh and Monoruth Singh, were three uterine brothers; that all the three brothers, while living jointly, carried on business jointly, and also purchased properties jointly; that certain moneys were, on dates mentioned, in the years 1270 and 1271, borrowed from one Gossai Munraj for the management of the joint business and for joint gain; that in this state of things, one of the three brothers, Monoruth Singh, having died, the survivors, that is, the plaintiff and Tundun Singh, purchased a certain property from one Kesso Lall, and for the purpose of making up the consideration-money, borrowed a further sum from Gossai Munraj, and thereupon executed a bond, dated the 15th August 1864, to secure repayment of all these sums, that is, the two sums which the three brothers had previously borrowed from Gossai Munraj, and the third sum which the two brothers, after the death of the one, had borrowed from the same creditor.

The plaint goes on to say that the borrowed money was applied to the aforementioned purposes, the property was purchased, and possession jointly obtained by the plaintiff and Tundun Singh after some litigation which was necessary to obtain it. Subsequently to this, the two surviving brothers, plaintiff and Tundun Singh, separated and, on the occasion of separation, executed each to each certain ikrarnamas by which each undertook to pay his share of the joint

ebts. The plaint then states that the bond-older, Gossai Munraj, brought a suit upon e basis of the bond against the present aintiff and the defendants who are repre-ntatives of Tundun Singh, and in that suit tained a decree against the present plaintiff lv. The plaint further alleges once more at the money covered by this bond was rrowed at the time of the joint-tenancy, d expended in joint business for joint nefit; and that, therefore, according to law d stipulation entered into in the ikrarna-a of the said date, the debt is chargeable the plaintiff and Tundun Singh, and upon death, the defendants in equal shares; d also that the decree-holder is about to ll the plaintiff's property. On this ground, e plaintiff says that his cause of action ose on the date when the decree against m was made in favor of Gossai Munraj, and ked that the defendants be decreed to pay e moiety of the debt; and so on.

The defendants, in answer to the plaint, nongst other things, say that the plaintiff s not paid Gossai Munraj the said decretal oney; consequently, a cause of action has t accrued, and the plaintiff's suit ought to dismissed.

The lower Court has overruled this pre-ninary objection of the defendants. The bordinate Judge says: "The acquisition of the right to sue is not dependent on the pay-ment of the decretal money, for the plain-iff is exclusively liable under the said decree. Had the decree been joint, it could have been said that he (the plaintiff) could not obtain a rateable share from his co-sharer without payment of the joint-debt."

On appeal to this Court, the defendants peat this objection, and we are of opinion at the objection is a good one. The claim the plaintiff in this suit belongs to a class cases in which the principal feature is at one person out of several, having dis-arged a joint obligation, is entitled to sue e others in order to obtain contribution m them. In this case, the obligation has t been discharged. But the plaintiff urges at he is, nevertheless, entitled to have a claration as against the defendants, that ey are liable to be called upon by him to lp him to discharge the obligation. The cree of the Court below has gone much rther even than this: it has, without any alification whatever, directed the defend-ts to pay the plaintiff a certain share of the oney, which the plaintiff has been decreed pay to Gossai Munraj. The general prin-ple which underlies almost all classes of right to contribution has been explained and illustrated by Mr. Justice Story in several parts of his work on Equity Jurisprudence. In section 477, he says: "Cases may easily "be stated where apportionment of a com-"mon charge, or, more properly speaking, "where contribution towards a common charge, "seems indispensable for the purposes of "justice, and accordingly has been declared "by the common law in the nature of an "apportionment towards the discharge of a "common burden. Thus, if a man, owning "several acres of land, is bound in a judg-"ment or statute, or recognizance, operating "as a lien on the land, and afterwards he "alienates one acre to A, another to B, and "another to C, &c., there, if one alienee is "compelled, in order to save his land, to pay "the judgment, statute, or recognizance, he "will be entitled to contribution from the "other alienees. The same principle will "apply in the like case, where the land "descends to parceners who make partition; "and when one is compelled to pay the "whole charge, contribution will lie against "the other parceners." And, in a judgment of Lord Chief Baron Eyre's (referred to in a note to the 9th Barton Edition of Story), it is said: "If we take a view of the cases, "both in law and equity, we shall find that "contribution is bottomed and fixed on gen-"eral principles of justice, and does not "spring from contract * * * *, and the reason "given in the books is, that, *in æquali jure*, "the law requires equality. One shall not "bear the burden in ease of the rest." So, again, in section 491, Mr. Justice Story says: "By the general rule of the mari-"time law, in all cases of general average, "the ship, the freight for the voyage, and the "cargo on board, are to contribute to the "reimbursement of the loss, according to "their relative values." And in section 492 he says: "Another class of cases to illus-"trate the beneficial effects of equity juris-"diction over matters of account is that of "contribution between sureties, who are "bound for the same principal, and upon his "default, one of them is compelled to pay the "money, or to perform any other obligation, "for which they all became bound. In cases "of this sort, the surety who *has paid* the "whole is entitled to receive contribution "from all the others, for what he has *done* in "relieving them from a common burden."

And in the next paragraph: "The claim "certainly has its foundation in the clearest "principles of natural justice; for, as all "are equally bound and are equally relieved,

"it seems but just that, in such a case, all "should contribute in proportion towards a "benefit obtained by all."

I should also add that in section 478 he remarks incidentally that "each party is liable to contribute only for his own portion," and that hence, in proceedings at law, separate actions may become necessary against each; and so, to prevent multiplicity of suits, recourse is best had to a Court of Equity. In Davies *vs.* Humphreys, 6 Meeson and Welsby's Reports, page 168, which was an action brought by one surety against a co-surety, Mr. Baron Parke (afterwards Lord Wensleydale), in delivering the judgment of the Court of Exchequer, said: "What, then. is the na-"ture of the equity upon which the right of "action depends? Is it that, when one surety "has paid any part of the debt, he shall "have a right to call on his co-surety or co-"sureties to bear a proportion of the bur-"then, or that, when he has paid more than "his share, he shall have a right to be reim-"bursed whatever he has paid beyond it; or "must the whole of the debt be paid by him, "or some one liable before he has a right to "sue for contribution at all? We are not "without authority on this subject, and it "is in favor of the second of these proposi-"tions. Lord Eldon in the case of *ex-parte* "Giffard* states that sureties stand with "regard to each other in a relation which "gives rise to this right amongst others, *that,* "*if one pays more than his proportion,* there "shall be a contribution for a proportion of "the excess beyond the proportion which, in "all events, he is to pay; and he expressly "says: 'That, unless one surety should pay "more than his moiety, he would not pay "enough to bring an assumpsit against the "other.' And this appears to us to be very "reasonable; for, if a surety pays a part of "the debt only, and less than his moiety, he "cannot be entitled to call on his co-surety, "who might himself, subsequently, pay an "equal or greater portion of the debt, in the "former of which cases such co-surety would "have no contribution to pay, and, in the "latter, he would have one to receive. In "truth, therefore, until the one has paid more "than his proportion either of the whole "debt, or of that part of the debt which "remains unpaid by the principal, it is not "clear that he ever will be entitled to demand "anything from the other and before that, "he has no equity to receive a contribution, "and, consequently, no right of action which "is founded on the equity to receive it. Thus, "if the surety, more than six years before "the action, have paid a portion of the debt "and the principal has paid the residue within "in six years, the Statute of Limitation will "not run from the payment by the surety, "but from the payment of the residue by the "principal, for, until the latter date, it does "not appear that the surety has paid more "than his share. The practical advantage "of the rule above stated is considerable, as "it would tend to multiplicity of suits and "to a great inconvenience, if each surety "might sue all the others for a rateable proportion of what he had paid, the instant he "had paid any part of the debt. But "whenever it appears that one has paid more "than his proportion of what the sureties "can ever be called upon to pay, then, and "not till then, it is also clear that such part "ought to be repaid by the others, and the "action will lie for it. It might, indeed, be "more convenient to require that the whole "amount should be settled before the sure-"ties should be permitted to call upon each "other, in order to prevent multiplicity of "suits; indeed, convenience seems to re-"quire that Courts of Equity alone, should "deal with the subject; but the right of "action having been once established, it "seems clear that, when a surety has paid "more than his share, every such payment "ought to be reimbursed by those who have "not paid theirs, in order to place him on "the same footing."

The present case, no doubt, differs somewhat from the case of sureties *inter se,* because the obligation of each surety is originally to pay the debt of a third person. In the present instance, as the claim is laid in the plaint, the defendants are co-principals with the plaintiff, each being bound to pay only his own share of the debt to discharge his own part of the obligation. Consequently the principle, which I have endeavoured to explain as the principle of equity upon which this class of cases depends, goes, I may say, more strongly against the plaintiff here than if he was simply a co-surety with the defendants. He is bound, according to his own statement of the case, in the end, to bear a definite portion of the original debt, and it does seem to me to be stretching the principle a very long way to maintain that he has a right to come into Court, and ask to be paid by his co-sharers before he has done anything whatever himself, even to discharge his own portion of the obligation. Moreover, he has himself disclosed in his plaint that

* 2 B. &. P. 269.

he defendants have been by a competent Court acquitted of all obligations to pay the riginal creditor. The plaintiff cannot call pon them by his own showing to pay Gossai Munraj. His only right, if he has right at all, is to call upon them to pay imself; and it seems to me, after the best onsideration that I can give to this case and the authorities which, I think, must be our uide in it, that he has no right to come into ourt to ask that they be made to pay him, ntil he can show that he has done someing on their behalf. It seems to me that, ntil he has discharged that which he says ught to be treated as a common burden, or, t any rate, done something towards the ischarge of it, he cannot say that there is ything of which he has relieved his cobtors, and which he can call upon them to hare with him.

The fact that Munraj has obtained a ecree against him, as alleged in the plaint, is ot alone, I think, of any importance in this uit under its present form. That decree erely declared, authoritatively, as between e present plaintiff and Munraj, the existnce of an obligation which must now be ken to have existed previous to the suit in hich the decree was made. The decree id not materially alter the character of that bligation: nor did the decree, in further rdering the mortgaged property to be sold nless the debt were paid, as we are told it id (although the plaint is silent on this oint), place any new burden on that proerty, for it thus only gave effect to Munraj's ready-existing mortgagee-rights. If, then, e plaintiff has a good cause of action in is suit, notwithstanding the fact that Munaj's decree remains altogether unsatisfied, e must have had that cause of action before e decree was passed; but no one has entured to urge before us that this was so. he ikrars do not, I suppose, amount to a ause of action in themselves, otherwise ey would have been sued on.

The cases to which we have been referred y the learned Counsel for the defendants, so r as they go, bear out this view. They ere cases in which it was decided that the me for the purposes of barring a suit under e Limitation Act does not, in a suit of this ort, begin to run until the plaintiff has paid e sum towards which he calls upon the efendants to contribute. In other words, e cause of action upon which he sued did ot arise until he had paid that money.

It appears to me, therefore, on the whole, at the objection made by the defendants in this suit, to the effect that the action in the form which the plaintiff has given it is premature, and that no cause of action is disclosed by the plaint as actually existing is a good objection, and ought to have been allowed to prevail in the Court below. This conclusion, I think, is fortified by considering how difficult it would be to frame any decree upon the footing of the plaint in this case. The decree which has been passed by the lower Court is clearly wrong. It is not just, and it is not in accordance with the principle upon which the plaintiff must, if at all, place his right of suit, that the defendants should be ordered to pay to him without qualification, without conditions, a specified portion of the whole debt, interest, and costs, decreed against him in another suit, towards which he has not himself yet contributed a pice. And if such a decree cannot be made, the only alternative would be a decree declaring that the defendants ought, in the event of the plaintiff's making a payment under and in discharge of Munraj's decree, ought to contribute towards that payment in certain shares. But it is obvious that a decree in this form would be simply an interlocutory decree, and could only be made use of in some future proceeding or suit to be instituted when the present plaintiff may be in a position to come forward and say that he has paid the money. By passing such a decree, this Court would be doing that which I believe it invariably abstains from doing, namely, declaring judicially the relations between parties, not for the purpose or with the power of giving relief or remedy at the present time, but for the purpose of the declaration so made being used as a part of a judicial proceeding on some future occasion. In saying this, I do not at all forget or lose sight of the class of cases to which Mr. Allan called our attention, and in which the immediate action of the Court may be invoked in order to prevent the future perpetration of a wrong or the future occurrence of irremediable mischief to the plaintiff when there is danger of either, unless some such remedy be at the moment afforded to him. But here the plaintiff does not even suggest an equity of this sort, and I see no reason whatever why a part of this suit, so to speak, should be heard and determined now, while the remainder must be left to be finished in some future litigation. If the plaintiff could have alleged that his own separate property was mortgaged by the bond of 15th August 1864 at the request of

Tundun Singh, that the money so borrowed was applied with Tundun Singh's sanction to the benefit of the joint property, and that afterwards the brothers separated and divided this joint property between them. I think that he would, by such a plaint, lay a good ground upon which might be maintained an equity on his part to call upon Tundun Singh (or his representatives) at any time to help in the proportion of his share in the joint property to disencumber his (the plaintiff's) land; in other words, to aid the plaintiff to this extent in redeeming the mortgage of 1864. At any rate there is authority for saying that the English Court of Chancery would recognize such an equity (Lee *vs.* Rook, Mosely 318). And if this be so, and if the suit brought by Munraj on the bond was, as seems probable from the form of the decree made in it on the 28th February 1871, essentially a suit for foreclosure or sale, inasmuch as such a suit would be to the present plaintiff a last opportunity to redeem, it would follow that he has a right to ask Tundun Singh's representatives to aid him in preventing the sale under that decree, by paying into Court, in that suit, on the present plaintiff's behalf and in his name, one moiety or other proper share of the money which was secured by the bond. Judging from that which has been disclosed to us in this matter, I can conceive it possible that the facts are such as would enable the plaintiff to make against the defendants a case of the character which I have just supposed. But, unfortunately, he has not done so in the plaint which is before us, nor have the issues been tried in this suit, which would almost necessarily have arisen between the parties if the plaint had taken the suggested form. I have been led to make the foregoing remarks, although they are, perhaps, not at all strictly relevant to the determination of this suit, because I have been very reluctant to give a decision in this case which must have the effect of rendering useless all the proceedings which have been taken, and all the expenses incurred up to this time, and by upholding the preliminary objection, we shall unquestionably leave it open to the parties to litigate the same matter over again, probably, at no very distant period; and, under these circumstances, I am anxious to mark out, as distinctly as possible, the exact ground on which our present decision rests. On the whole, I do not see how, otherwise than by consent of parties, we can pursue any course other than that of dealing with the objection raised by the defendants upon its strict legal merits; and, consequently, I feel myself obliged to say, I think, that the plaint upon the materials before us does not disclose a complete cause of action, and that the suit ought to have been dismissed in the Court below.

It seems to me, therefore, that we must dismiss the suit with costs.

Ainslie, J.—I concur with my learned brother in thinking that the preliminary objection taken by the respondent must prevail.

As to how a suit may be framed which would enable the plaintiff to bring an action against the defendant before he (plaintiff) himself shall have paid the full amount that, on his own allegations, represents his share of the debt under the decree obtained by Gossai Munraj, I do not wish to express any opinion.

The 12th December 1872.

Present:

The Hon'ble Dwarknath Mitter and W. Ainslie, *Judges.*

Decree—Worship of Idol—Removal and Reconveyance.

Case No. 385 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 8th December 1871, modifying a decision of the Moonsiff of Bhanga, dated the 29th September 1871.

Ram Soondur Thakoor and others (Defendants), *Appellants,*

versus

Taruck Chunder Turkoruttun and others (Plaintiffs), *Respondents.*

Baboos Sreenath Dass and *Bungshee Dhur Sen* for Appellants.

Baboos Kalee Mohun Dass, Romesh Chunder Mitter, and *Kalee Kant Sen* for Respondents.

In a suit respecting an idol which had been set up by the common ancestor of the litigants, but whose temple had been destroyed by the erosion of the river, plaintiffs asked for a declaration of their right to remove the idol to their own house, and to keep it there for the period of their turn of worship. The Lower Appellate Court gave plaintiffs a decree:

HELD that it was incumbent upon that Court, before making the declaratory decree, to define the precise period for which plaintiffs were entitled to worship the idol, deducting any period for which defendants had a joint claim:

HELD that the decree ought also to provide for the re-conveyance of the idol to the place where it was, at the expense of the plaintiffs, and before the expiration of their turn.

Mitter, J.—THE subject-matter of dispute in this case is an idol, called Bashoodeb Thakoor, which, it is admitted on both sides, was established by the common ancestor of the litigant parties. This idol, it appears, was established in a village called Mookdoba; and it further appears that the old temple in which it was placed having been destroyed by the erosion of the river, it has, according to the finding of the Moonsiff (which we see no reason whatever to interfere with), been removed to a neighbouring spot, about 8 russees off, in the same village. The plaintiffs have now removed themselves to a village called Khatra, and the object of this suit is to obtain a declaration of their right to remove the idol to their own house in that village, and to keep it there for the period of their turn of worship, which is defined in a schedule filed along with the plaint.

The defendants in their written statement contended that the idol in question could not be removed, inasmuch as the founder of it had left an injunction to the effect that it should not be removed from the village of Mookdoba so long as that village existed. They further contended that the plaintiffs' turn of worship does not cover the full period mentioned by them in the schedule above referred to; that during three days out of that period, some of the defendants are entitled to worship the idol at particular hours specified by them in their written statement; and, lastly, that the idol having been removed to the place where it now is with the consent of some of the plaintiffs, the plaintiffs were not in a position to maintain this suit for a declaration of their right to remove it to Khatra.

The Moonsiff, who tried the case in the first instance, came to the conclusion that the idol was not removable; that the founder of it had left an injunction that it should not be removed from the village of Mookdoba so long as that village existed; and looking to the size of the idol, as well as to the fact that it has been for a number of years in the village of Mookdoba, without being removed from that place by any of the other shebaits, he dismissed the plaintiffs' suit.

Against this decision the plaintiffs appealed to the Subordinate Judge, and that officer has given a decree to the plaintiffs upon the ground that the injunction relied upon by the defendants has not been made out by any satisfactory evidence; that, according to the Hindoo shastras, there could be no objection to the removal of the idol; and that the plaintiffs were entitled to remove it to their own house at Khatra, and to keep it there for the period of their own turn of worship.

Against this decision this special appeal has been preferred, and it has been contended on behalf of the defendants that the Subordinate Judge has committed an error in law in refusing to act upon the oral evidence produced by the defendants in order to prove the injunction relied upon by them in their written statement, merely upon the ground that no oral evidence could be admitted to prove a point of that description.

We are of opinion that this objection must fail. We do not understand the Subordinate Judge to have laid it down as a proposition of law that mere oral evidence, unsupported by documentary evidence, is not sufficient to prove an injunction like that relied upon by the defendant. But what the Subordinate Judge really means to say is that, in a matter of such importance as the non-removability of the idol in question, some documentary evidence ought to have been forthcoming, and that, in the absence of such evidence, he was not prepared to rely upon the testimony of the witnesses examined by the defendants in support of their allegation. No doubt these are not the precise words used by the Subordinate Judge in his judgment; but it seems to us, after a careful perusal of his decision, that this was what he really intended to say when he said that the defendants have failed to prove the injunction in question to his satisfaction.

The Subordinate Judge, however, appears to have omitted to define the precise period for which the plaintiffs are entitled to keep the idol in their own house at Khatra. It appears to us that there was a dispute raised on this point by the defendants in their written statement, and in a suit of this description, which is for the declaration of the plaintiffs' right to remove the idol to their own house, and to keep it there for a period of time distinctly specified by them in a schedule which must be taken to be a part of their plaint, we think it was incumbent upon the Lower Appellate Court to define the precise period for which the plaintiffs are entitled to worship the idol before it could make the declaratory decree which it has passed in their favor. Should, however, it be found by the Lower Appellate Court that the plaintiffs and the defendants are jointly

entitled to worship the idol during any part of the period mentioned by the plaintiffs in the schedule above referred to, the Lower Appellate Court should not allow the plaintiffs to remove the idol to their own house at Khatra for that portion of time.

In conclusion, we wish to observe that the decree of the Subordinate Judge requires a further modification. If the plaintiffs are to be allowed to disturb an arrangement which has existed for a period of at least 100 years, and to remove the idol to a place situated at a considerable distance from the place where it wasi originally established, it seems to us reasonable and just that they should undertake to re-convey the idol to the place where it now is, or rather to the place where it was at the time of the institution of this suit, before the expiration of their turn of worship. The decree of the Subordinate Judge ought, therefore, not only to define the precise period for which the plaintiffs are entitled to keep the idol at Khatra, but it should further be qualified by the condition that, if the plaintiffs remove the idol to their own house during their own turn of worship, they should re-convey it at their own expense to the place where it was at the time of the institution of this suit before the expiration of that turn, so as to allow the other shebaits the full benefit of their turns or palas.

We wish to add that it has not been contended before us by the pleader for the appellants that this idol is not removable according to the Hindoo shastras. The special appellants rested their case entirely upon the injunction alleged to have been left by their ancestor; and as that plea has been rejected by the Subordinate Judge upon evidence, we cannot interfere with the finding of that officer in special appeal.

Each party will bear his own costs in this Court. The costs of the lower Courts will abide the ultimate result.

The 16th December 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble J. B. Phear, F. A. Glover, Dwarkanath Mitter, and W. Ainslie, *Judges.*

Decree (not joint but several)—Execution—Limitation—Act XIV. of 1859, s. 20.

Case No. 148 of 1872.

Miscellaneous Special Appeal from a decision of the Officiating Judge of Mymensingh, dated the 8th of February 1872, reversing a decree of the Officiating Moonsiff of Niklee, dated the 4th October 1871.

J. P. Wise (Decree-holder), *Appellant,*

versus

Rajnarain Chuckerbutty and others (Judgment-debtors), *Respondents.*

Mr. C. Gregory and *Baboo Doorga Mohun Doss* for Appellant.

Baboo Boykuntnath Doss for Respondents.

A decree against one person for the rent of one period and against another for the rent of another period is in fact two decrees, *i. e.*, a separate decree against each for the sum for which he is liable. In such a case the decree is to be kept in force against each, and the proceedings in execution against one of the defendants are not sufficient to prevent the law of limitation applying to the other defendant.

In 1853, Mrs. Catharine sued one Gouree Sunkur Chuckerbutty and a Mr. Gasper for arrears of rent for 28 years, from 1232 B. S. (A. D. 1832) to 1259 B. S. (A. D. 1853), of a putnee talook. In 1855 it was decided by the then Moonsiff of Niklee that Mr. Gasper was liable for the rent of that portion of the year 1259 B. S. (A. D. 1853) during which he had been in possession of the putnee talook by purchase from Gouree Sunkur Chuckerbutty, and that Gouree Sunkur was responsible for the rent of the previous years, which were not barred by limitation. Mr. J. P. Wise, the assignee of Mrs. Catharine's decree, took out execution against Gouree Sunkur in 1862, and realized a small portion of the decree. Mr. Gasper having died, the decree-holder revived the suit on the 14th April 1864, substituting the name of Mr. Bagram, the executor of Mr. Gasper, and, from 1864 to 1868, proceeded solely against this judgment-debtor.

Having obtained an order from the Judge of Backergunge to levy execution against the estate of Mr. Gasper for the balance of the amount of the decree, Mr. Bagram appealed to the High Court against this order. The High Court, on the 12th of September 1868, reversed the order, and Mr. Bagram was declared to be separately liable for the rent of the putnee talook for that portion of 1259 B. S. (A. D. 1853) during which Mr. Gasper had been in possession. The decree-holder had his suit revived in 1870, and the names of the sons of Gouree Sunkur (the

resent respondents) were placed on the cord as the representatives of Gouree Sunur, and execution was issued in February 871 against any property of Gouree Sunkur. he respondents contended that the decreeolder not having taken any proceedings to ecute his decree within three years, his ght to execute his decree was barred. The Moonsiff overruled the objection on the ound that the proceedings against Mr. Bagm were sufficient to keep the decree in rce against Gouree Sunkur and his repreentatives. The respondents appealed from is decision to the Officiating Judge of ymensingh, who ordered the execution to stayed. The decree-holder appealed to e High Court, and their Lordships, the hief Justice and Mr. Justice Bayley, referd the point for the opinion of the Full ench with the following remarks :—

"We think the decisions reported at page o, Weekly Reporter, Vol VIII., and page 10, Weekly Reporter, Vol X., are conflicting. The case must, therefore, be referred to a Full Bench.

The facts of this case are stated in the dgment of the Moonsiff, and the question hich arises and is referred to a Full Bench whether, in the case of such a decree as as sought to be executed in this case, proeedings in execution against one of the efendants are sufficient to prevent the law f limitation applying to process of execuon against the other.

The decisions which are applicable, *viz.*, Weekly Reporter 80, and 10 Weekly Reporter 10, are conflicting. The decree n this suit, it will be seen, has been held by his Court to be one declaring the defendants o be separately liable for portions of the ent decreed. In the former of these cases t was held that, where a decree has been assed against several defendants, each of whom is declared to have a separate liability in respect of a definite amount, execution gainst one or more of them keeps the decree in force against all simultaneously. In the latter case, it was held that where a decree is not a joint one against all the defendants, but a separate one as against each batch of defendants, the proceedings against one batch have no effect towards keeping alive the separate decrees against other batches. In this case the learned Judges said they did not consider there was any difference of opinion between them and the Judges in the former case; that the Judges in that case thought that the decree before them was joint and several, and considered that the joint liability of all the defendants was kept alive by proceedings against any single one. This appears to be a mistake, for Mr. Justice Jackson in his judgment in the former case says: 'It has frequently been held in this Court where the decree has passed against several defendants declaring them to be jointly and severally liable, that execution against one or more of such judgment-debtors keeps the decree in force as against all. The contention in this case is that the defendants were not declared to have under the decree a joint and several liability, but each a separate liability in respect to definite amounts. There is no precedent of this Court bearing upon the point.' The decrees in both cases were of the same nature, and if one is to be held to be joint, it would seem that the other ought to be. We, therefore, refer to a Full Bench the question before stated."

Mr. Gregory, for the appellant, contended that the decree in this suit was one decree, although the decree declared in what portions the defendants were liable, and that the proceedings against one of the defendants (Mr. Bagram) kept the decree in force against the other defendants, and that, therefore, the decree-holder was not barred by section 20 of Act XIV. of 1859 from executing his decree; and submitted that the present case was similar to the case of Mohesh Chunder Chowdhry *vs.* Mohun Lall Sircar (8 Weekly Reporter 80). In the case of Khema Debia *vs.* Kumola Kant Bukshee (10 Weekly Reporter 10), it was held that the decree was not a joint decree against all the defendants, but a separate decree against each batch of defendants, and that the proceedings against one batch would not keep the decree in force against the other batches of defendants; and Markby, J., in delivering judgment, comments on the case in volume 8 of the Weekly Reporter. He says: "There is, no doubt, great similarity between that case and the present, and had we differed, we might have thought it right to send the case before a Full Bench. But we do not consider that, upon any principles of law involved in this case, there is any difference of opinion whatever. The Judges in that case thought that the decree before them was joint and several, and considered that the joint liability of all the defendants was kept alive by proceedings against any single one. We do not question this, but in our opinion the decree before us is not a joint decree as against all the defendants." [*Phear, J.*—In this case there is no community

of interest between the defendants. The decree declares that Gouree Sunkur is liable for the rent up to 1859, and Gasper for a portion of the rent of that year. Is the decree not virtually two decrees?] The decree declares the separate liabilities of the defendants, but it is a joint decree.

Baboo Boykuntnath Doss, for the Respondents.—There are really two decrees in this suit, and proceedings to execute one against one of the defendants cannot keep the decree alive against the other defendants. The decree in this case is not joint. In Stephenson *vs.* Unnoda Dossee (6 Weekly Reporter, Miscellaneous Rulings, 18), at page 21 of the judgment it is stated that "it may be that some decrees, though passed nominally on one document, are, in reality, separate decrees against separate individuals. In such cases, the Court might, and probably would, consider them to be separate, and in execution, put the law of limitation into force against the different defendants, as if they were separate." Such is the state of the present case, and the appellant is not entitled to succeed on his appeal.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—The question which is put to the Full Bench is, whether, in case of such a decree as was sought to be executed in this case, the proceedings in execution against one of the defendants are sufficient to prevent the law of limitation applying to process of execution against the other.

The suit appears to have been brought to recover arrears of rent for 28 years, and it appears that one of the defendants, Gouree Sunkur, had been in possession up to a certain time, and that then the possession had been transferred by sale and purchase from him to Mr. Gasper, and there was no joint liability. Each person was liable for the rent for the period during which he or she had occupied, and the decree was, in the first instance, made by the Moonsiff, apparently, in that form. The Principal Sudder Ameen appears to have modified that on an appeal, and to have declared that the rent was to be allowed for the whole time against the persons in possession. That was in reality the same thing, but leaving the period for which each would be liable to be determined in the execution of the decree. Subsequently, the High Court appears from the proceedings to have declared that that was so, and Mr. Bagram, who represented Mr. Gasper, was declared to be separately liable for the rent of 1259. Although these persons were joined in the suit in this way, yet we must treat the decree as what it must have been by law—a decree against one person for the rent of one period, and a decree against the other person for the rent of another; and I think such a decree as this, although it is on one piece of paper, is in fact two decrees, a separate decree against each for the sum for which each is liable. When we come to apply to that the terms of section 20 of the law of limitation, there is really no difficulty; the decree is to be kept in force against each, and to be treated as a separate decree against each in such a case as this, as it would in the case of persons sued for contribution, because it is a separate liability, and each is liable only for his own share.

I think that although the decree is made in one suit, it is in reality and substance a separate decree against each for the portion for which each is declared to be liable. We must answer to the question which is put to us that in such a case as this the proceedings are not sufficient to prevent the law of limitation applying to the other defendant.

The case will go back to the Division Bench with that answer.

The other Judges of the Full Bench concurred.

The 16th December 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Declaratory Decrees—Remand—Limitation.

Cases Nos. 331 and 332 of 1872.

Special Appeals from a decision passed by the Judge of Sarun, dated the 22nd September 1871, reversing a decision of the Subordinate Judge of that District, dated the 30th November 1870.

Mussamut Doolhun Jankee Kooer (Plaintiff), *Appellant,*

versus

Lall Beharee Roy and others (Defendants), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

suit by a reversioner to set aside a *sur-i-peshgee* e executed more than nine years previously, having d by reason of the inability of the plaintiff to estab- the right set up in it, the High Court was asked to inue it by remanding it to the lower Court, in order a declaratory decree might finally be passed :

ELD that it was not a case in which it would be t for the Court to exercise its discretion.

uære.—Is a suit for a declaration of title to land erned by the limitation of six years or by that of ve years?

Couch, C.J.—In this case the plaintiff ght to obtain possession of an 8-anna re of the 16 annas of certain mouzahs ned in the plaint, by setting aside a *sur-i-hgee* deed for Rs. 799, which had been cuted by the mother and step-mother of plaintiff. She alleged that the ladies l no right to execute the deed, and that it s done without necessity. She then stated t her mother and step-mother executed deed of relinquishment in her favor by ich they assigned the property which had n derived from her father to her, and so claimed to be entitled at once to set aside deed, saying that the cause of action rued immediately on the deed of relin- shment being executed.

The Subordinate Judge, in his judgment, er holding that the suit was not barred by law of limitation, found that the deed s one which could not be treated as valid, cause the mother of the plaintiff had no thority to execute it without necessity, and decreed in favor of the plaintiff, ordering t she should obtain possession of the perty, and that the deed of *sur-i-peshgee* suit should be "reversed."

Upon appeal from that decision, the District Judge rightly held that the deed of relinquishment could not operate to give the plaintiff a right of suit immediately to have the deed of *sur-i-peshgee* set aside, and that the ladies, after executing such a deed as that, could not destroy it as regards their own life-interest by relinquishing the property to the person who might become entitled to it when they were dead, and upon that ground, he reversed the decision of the Subordinate Judge, with costs.

It was not disputed. Indeed, it could not be successfully disputed in the special appeal that this decision was right; but it was submitted to us that at all events the plaintiff was entitled to have the question of necessity determined, and if that were determined in her favor, that a decree should be made declaring that the *sur-i-peshgee* deed was invalid against her, and that upon the death of her mother and mother-in-law, she would be entitled to the property, notwithstanding the mortgage.

Now, this deed of *sur-i-peshgee was* executed more than nine years before the suit was brought, and without determining which clause of the law of limitation would be applicable to a case of this kind, it is for the Court to consider whether it will exercise its discretion in passing a declaratory decree after the lapse of so long a time.

It has been well settled that it is discretionary with the Courts to pass a declaratory decree. The case in which this was held by the late Chief Justice and Mr. Justice Loch is in the 8 Weekly Reporter, page 64, following the decisions upon a similar provision of the law in England.

We have to see whether, even if the suit had been originally framed as asking for a declaratory decree, it would be right for the Court to give it. It may be said that if the plaintiff has to wait until the ladies are both dead, it will be much more difficult to procure evidence which will throw light upon the transaction. No doubt that is so; but, on the other hand, it is possible that there will be no necessity for any suit or declaration of right at all, because the mortgage may be satisfied during the lives of the ladies, in which case there would be nothing standing in the way of the plaintiff's succession. But we are asked here not to pass a declaratory decree upon a plaint asking for it, and framed accordingly, but (the suit having failed, the plaintiff not being able to establish the right which she set up) to continue it now by remanding it to the lower Court in order that a declaratory decree may finally be passed. This is asking the Court to do more than it would have thought it right to do after the lapse of nine years upon a plaint properly framed. Therefore, without determining the question whether the six years' limitation would apply to a suit for a declaratory decree, it is sufficient, we think, for us to say that it is not a case in which it would be right for us to exercise our discretion. But we should wish it to be understood that our not deciding the question upon the law of limitation is not to be taken as at all implying an opinion on our part that the six years' clause does apply; if we had to express an opinion upon it, the inclination of our opinion would be that the twelve years' clause applies to a suit for a declaration of title to land. But it is not necessary to determine that now, and in most suits for a declaratory decree, it would not be necessary to do so. Both appeals will be dismissed with costs.

The 17th December 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Compensatory Interest—Decree.

Case No. 75 of 1872.

Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 1st February 1872.

Doorga Dutt Singh (Defendant), *Appellant,*

versus

Bunwaree Lall Sahoo (Plaintiff), *Respondent.*

Mr. J. H. A. Branson and *Baboo Abeenash Chunder Banerjee* for Appellant.

The Advocate-General, Baboo Boodh Sen Singh, and *Moonshee Mahomed Yusuf,* for Respondent.

The compensation due to a plaintiff for the delay which must ensue between the date when the plaint is filed, and the date when the decree can be reasonably expected to be satisfied, is, as a general rule, best and most simply estimated by a uniform rate of interest upon the total amount decreed, reckoned from the date of the decree.

Phear, J.—THE order with which the judgment of the Court below terminates is unquestionably obscure, and this has led to a decree being drawn in terms which, as it appears to us, give compound interest to the plaintiff. This must be altered; and we further think that the rate of interest given by the Judge subsequent to the decree, namely, 12 per cent., is higher than what ought to be awarded in a case of this kind. I will add for my own part that had I been deciding the case in the Court of first instance, I think I should hardly have given interest for the time intervening between the date of the filing of the plaint and the date of the decree at so high a rate as that mentioned in the bond. The plaintiff comes into Court, strictly speaking, for the purpose of recovering that sum which is due to him at the time when he files his plaint, together with such further interest as, in the discretion of the Court, will be sufficient to compensate him for the delay which must necessarily ensue between the date when the plaint was filed and the date when the decree can be reasonably expected to be satisfied. Generally, we think, this compensation is best, and certainly most simply, estimated by a uniform rate of interest upon the total amount of the decree, reckoned from the date of the decree. In the form which the Judge has given to his decretal order, this compensation will be, so far as a part of the sum decreed is concerned, at the rate of 13½ per cent. interest for the interval between the plaint and the decree, plus a further sum of 12 per cent. upon that interest from the date of the decree onwards. And in the present case, where interest, in fact, forms a very large ingredient in the amount decreed, it seems to us that this portion of the compensation for the delay is unduly great. However, as the Judge has, in the exercise of the discretion which certainly rested with him, given to the plaintiff interest upon the principal sum during the interval between the filing of the plaint and the passing of the decree, at the rate stipulated in the bond, we are not prepared to say that he is wrong in this particular, and that, consequently, his decree ought to be varied in this point. But we think, having regard to the fact to which we have already referred, namely, that a very large amount of interest exists as an ingredient in the amount decreed, and to the fact that the Judge has given this high rate of interest for the interval between the filing of the plaint and the decree, that the subsequent rate of interest ought to be very materially lessened below 12 per cent.

We think that the Judge's order must be varied, and that, instead thereof, it be decreed that the plaintiff do recover the principal sum secured to him by the bond, together with interest at the rate mentioned in the bond up to the date of the Judge's decree, and the costs of the lower Court; and that the defendant do further pay to the plaintiff interest at the rate of 6 per cent. from the date of that decree until realization upon the amount decreed, including the costs.

As the appellant has certainly succeeded in this Court, we think he ought to have the costs of this appeal, and we assess them at 500 rupees.

The 18th December 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Adjournments—Code of Civil Procedure, s. 148.

Case No. 44 of 1872.

Regular Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 28th August 1871.

Pearee Mohun Bera (one of the plaintiffs), *Appellant*,

versus

Shama Churn Mytee and another (Defendants), *Respondents*.

Baboo Hem Chunder Banerjee for Appellant.

Babu Juggut Chunder Banerjee for Respondents.

Where adjournments are made by a Court in order to give effect to its processes for compelling the attendance of the witnesses, being thus made as much on its own motion at the instance of the defendant as at the instance of the plaintiff, the case cannot be said to come under Act VIII. of 1859, s. 148, which contemplates a case where a party has obtained time to produce his witnesses, and has failed to do so.

Couch, C.J.—It appears that there was an adjournment of the case on the application of the plaintiff to the 24th of July. Subsequently to that, the defendants made an application for an adjournment, and the adjournments that took place after the 24th of July appear to have been not so much adjournments made on the application of the plaintiffs and giving time to them, but rather adjournments by the Court in order to give effect to the processes which it thought fit to issue to compel the attendance of the witnesses. I doubt very much whether that can be said to be a case coming within section 148 of the Code of Civil Procedure, which appears to me to contemplate a case where a party has expressly obtained time to produce his witnesses, and has failed to do so. Here, the Court was extending the time as much on its own motion, or at the instance of the defendant, as at the instance of the plaintiffs; and when the case came before the Judge on the 28th of August, he ought not to have proceeded under section 148. If he thought it right to proceed under that section, he might have granted further time to the plaintiff, and have heard any representation that might be made to him for the purpose of satisfying him that it would be proper to issue an attachment of property against these witnesses, or otherwise seen that everything was being done by the plaintiff that could be done to produce them.

I think his decision on the 28th of August was premature, and not authorized by the section under which he professed to proceed. It must be reversed, and the case must be remanded to the lower Court to be dealt with according to law. The appellant must have the costs of this appeal and those in the lower Court.

Glover, J.—I am of the same opinion.

Mitter, J.—I am of the same opinion.

The 19th December 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Debuttur Land—Suit for Surplus Proceeds—Limitation.

Case No. 2 of 1872.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 10th July 1871, affirming a decision of the Subordinate Judge of that District, dated the 27th March 1871.

Mohamaya Dossee and others (Defendants), *Appellants*,

versus

Bindoo Bashinee Dossee and others (Plaintiffs), *Respondents*.

Baboo Chunder Madhub Ghose for Appellants.

Baboos Ashootosh Dhur and *Kalee Mohun Doss* for Respondents.

A suit to establish a right to a beneficial interest in the surplus proceeds of *debuttur* land, after providing for the worship of the idol, where the parties were *sebaits*, was held to be not a suit between co-trustees to the share claimed, but one to which the law of limitation could apply.

Couch, C.J.—The nature of the suit in this case seems to have been correctly stated by the Subordinate Judge as a suit brought for the recovery of possession of an 11-anna share in 168 beeghas odd cottahs of land, which the plaintiffs alleged they had been dispossessed of, and of which they asked to be restored to the possession. According to his statement, the plaintiffs allege that, under color of rent-decrees, all the principal defendants have dispossessed them from their lands. Hence they ask for recovery of possession to the extent of 11-anna share of 168 beeghas and odd cottahs of land.

It is not a suit in which the plaintiffs, as trustees with the defendants of the property,

seek to oblige the defendants to apply the whole of the proceeds to the worship of the idol, or complain of that not having been done; but it is in reality a suit by which they seek to establish a right to, and to get the benefit of, the surplus proceeds of the property after providing for the worship of the idol. That is the nature of the suit, and it has not been disputed in the argument for the respondent that only a portion of the income of this property was really devoted to that purpose.

To consider first the judgment of the Judge. It appears to us that he has taken an erroneous view of the matter in dealing with the question of the law of limitation, because such being the nature of the suit, he says, as to the cases—which had been quoted to him upon the law of limitation: "It seems to me that the precedents apply "to cases where the question of title in the "property itself arose; in the present case "neither plaintiff nor defendant would have "any title in the property. It did not belong "to them, but to the idol; they were only "trustees of the idol, and the possession of "one could not be adverse possession as "regards the other, because neither of them "could claim a specific right or interest in "the property itself."

It was not so. The very case of the plaintiff is opposed to that view; it was a claim of title to that portion of the property which was not applied to the worship of the idol, and as regards that portion, the parties would not be co-trustees at all, and there would be no trust. As regards so much as would be necessary for the worship of the idol, they might all be considered as trustees for the idol, and bound to apply that portion for the worship of the idol; but when that had been done, and there was a surplus, they were entitled to that as co-sharers, each in his own right, and not as trustees—just as much entitled as if the property had not been subject to any trust. Instead of being, as the Judge appears to treat it, a trust of the entire property with no beneficial interest in these parties, there is a duty on their part as owners of the property to provide for the worship of the idol, and a charge upon the property in their hands to that extent.

That being the nature of the interest, there is no reason why the law of limitation should not apply to the right to the surplus; and if a person is dispossessed of his share, and the circumstances are such that he cannot bring himself within the 13th clause of section 1 of Act XIV. of 1859, there is no reason why the law of limitation should not apply, and he should not be prevented, after the lapse of the prescribed period, from bringing a suit to enforce his right to the surplus. When a claim of that kind is put forward, it is, in reality, for the purpose of enforcing a right to the beneficial interest in the share. We do not think we can say that he has a right, as trustee, to a share in so much as would be required for the worship of the idol, and there is nothing here to show that any complaint was made, or that any case existed, which required the plaintiff to come forward to protect, what we may be allowed to describe as the interests of the idol, and to see that the worship was properly performed. There is nothing to show that that was the object of the suit, and the plaintiffs cannot be allowed now to say that it is in order to support the judgment of the lower Courts, which proceed on a different ground—which is what has been attempted to be done.

So far the judgment of the Appellate Court is wrong, and the Subordinate Judge appears, in the same way, to have taken an erroneous view of the nature of the case, and for the purpose of determining the law of limitation, to have treated it as if there were a trust entirely for the idol, and the property was held by this family solely for the benefit of the idol, ignoring the circumstance of the right to the surplus. There are several passages in his judgment which show that this is what he thought. He says: "After "hearing the elaborate arguments of both "parties, it is clear to me that the plea "of limitation is unsupportable. My rea-"sons for so thinking are these: it is not "denied that it is *debuttur* land, or, at least, "that the bulk of the receipts from it is "devoted to the worship of the family-idol." He speaks here in an uncertain way: "It is "not denied that the land is *debuttur*, or at "least that the bulk of the receipts from it "is devoted to the worship of the idol." He then proceeds: "The balance, whatever it "may be, is, as is generally the case, appro-"priated by the *shebaits;*" he cannot mean improperly appropriated, but lawfully and properly; and further on, having spoken in this uncertain way, he says: "If they are "viewed in the light of trustees of the "idol, the limitation has no manner of appli-"cation. If the management of one member "of this joint family, so far as the *Seba* "went, was considered as the management of "all of them, the plea totally fails." If they were merely trustees for the idol without

any beneficial interest in the surplus, the management of one might be considered as the management of the others, but that is not so.

And the Subordinate Judge appears to us to have dealt with the case in the same way as the Judge did, as considering it as a trust of the whole, and not sufficiently bearing in mind that in reality it was a question of right to the beneficial interest in the surplus. As we have observed in the course of the argument, both Courts appear to have been inconsistent in what they have done, because after dealing with the question of limitation, as if the whole was trust property, they give to the plaintiff what is in effect a decree for a share of the surplus, for a beneficial interest in the property, without reference to any trust for the worship of the idol.

We think that there is nothing in this case to prevent the application of the law of limitation, and with regard to the three respondents, Chunder Mohun Roy, Gopal Chunder Roy, and Nistarinee Dossee, we think the point which is taken in their favor is not a good one. It is said that it is admitted that they are entitled to 2½ annas. That may be, but it does not prevent the application of the law of limitation to any further share which is not admitted. In order to bring them within clause 13, they must have received something on account of the share which they are claiming in the suit, and if they are claiming in the suit more than the 2½ annas share, they must show that they have been receiving something in respect of the larger share. All that is admitted is that they have received the 2½ annas share; it is not admitted as part of a larger share, or that they have been joining in the worship of the idol in respect of more than the 2½ annas share; therefore no distinction can, we think, be made between them and the other plaintiffs, respondents.

The decrees of both the lower Courts will be reversed, and the case referred to the District Judge to find upon the evidence now in the suit whether, within twelve years before the filing of the plaint, any payment has been made to any of the plaintiffs or to persons through whom they claim on account of the shares claimed by them respectively.

The Judge will return his finding to this Court.

The 20th December 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Manager — Receiver — Attached Property—Second Attachments—Moveable Property—Notice of Attachment—Act VIII. of 1859, ss. 239, 243.

In the Matter of

Messrs. John Tiel and Co., *Petitioners,*

versus

Abdool Hye and others, *Opposite Party.*

Messrs. J. T. Woodroffe and *C. Gregory* for Petitioners.

Messrs. J. H. A. Branson, T. D. Ingram, A. F. Lingham, and *R. E. Twidale,* and *Baboos Taruck Nath Palit, Boodh Sen Singh,* and *Rughoobuns Sahoy* for Opposite Party.

A manager appointed under Act VIII. of 1859, s. 243, so far as he is an officer of the Court, is at most the hand of the Court for the purpose of gathering in, on behalf of the judgment-debtor, the moneys due to him in order that they may be immediately applied to the satisfaction of the decree. If he does more than this, and deals with the subject of the property itself, he must do so as the agent of the judgment-debtor, and not properly as an officer of Court.

Even a Receiver, appointed by the Court in a Civil suit, with the object of preserving property and keeping it within the reach of the Court, until a final decree can be made, can but exercise at the utmost such powers and rights over the property as the parties to the suit turn out to be possessed of when their rights are finally determined.

Where attached property is mortgaged by the judgment-debtor with the consent of all parties concerned, yet, so as to leave some proprietary interest in the judgment-debtor, any judgment-creditor coming after the appointment of the manager and the making of the said mortgage, has a right notwithstanding to attach and sell what remains of the judgment-debtors's interest in the property.

An application for such second attachment cannot properly be refused by a Court on the ground of the property being under the management of the District Court, pursuant to s. 243, even if the Judge's precept forbids such attachment.

So far as property sought to be attached is moveable, if in the hands of the Judge or the Judge's Court, it must be attached in the mode prescribed by the first part of Act VIII. of 1859, s. 239, and a notice so sent to the Judge is an effectual attachment of such moveable property, although it is refused by the Judge, whose refusal to receive the notice cannot make that no attachment which would otherwise be a good attachment.

Phear, J.—THE successive application which the present petitioner has been compelled to make to this Court seem to justify

the inference that the Courts below and some of the parties before us are in a state of considerable bewilderment with reference to a matter which we venture to say a little careful consideration ought to make tolerably clear.

In order to explain the view which we take of the case in its present condition, we will state a little in detail some of the proceedings which have been taken, and acts which have been done, in reference to the property in question, so far as these have been brought before us.

In 1867, Abdool Ali and Rumzan Ali purchased the Seetulpore indigo concern in equal shares. In 1868, we believe, Rumzan Ali's share was attached by the Bank of Bengal in execution of a decree for Rs. 14,000, and by Guneshee Lall in execution of a decree for Rs. 40,000, both decrees having been made in suits in the Judge's Court, which it will be convenient to designate as suits A and B. Rumzan Ali died shortly after this was done, and is now represented by Abdool Hye and Mehndi Khanum. Abdool Ali bought the Bank of Bengal's decree for Rs. 14,000 in the suit A. Then, in 1869, Abdool Ali as owner of 8 annas share, and also as decree-holder in the suit A, having an attachment for the Rs. 14,000 over the other 8 annas share, and the decree-holder in suit B, he also having an attachment over the second 8 annas share for the Rs. 40,000, and Abdool Hye and Mehndi Khanum, the judgment-debtors in both the suits A and B,—all these persons jointly petitioned the Judge to appoint a manager of the attached property under the provisions of section 243 of the Civil Procedure Code. In order to carry on such management of the property as the parties understood this manager was appointed to effect, and in order to work the concern, it was found necessary to raise some money; and accordingly, with the consent and approbation of the Judge, these four parties whom we have just now mentioned, reckoning Abdool Ali in his different capacities as two persons, jointly authorized the manager to borrow money from the decree-holder in the suit B; and for the purpose of securing the repayment of the money so borrowed, they joined in executing a mortgage of the indigo concern, the indigo weed, and so on, to Rughoonath Pershad, the decree-holder, as we have already said, in the said suit.

Under this arrangement the manager worked the concern and allowed Rughoonath Pershad, the mortgagee, to receive and sell the indigo which was produced.

Let us stop here for a moment to see what is the real result of this state of things. The property, which was the subject of attachment in the suits A and B, was partly, as we understand, immoveable property, such as land, houses, and buildings in the possession at the time when the attachment was made of the judgment-debtor or his agent, and partly moveable property in the shape of implements and machinery of the concern and indigo already made or in the process of manufacture—this portion of the property also being in the possession of the judgment-debtor or his agent. We assume for the present that the attachment of these respective properties was properly effected according to their nature and pursuant to the provisions of the Civil Procedure Code. If this was so, we may say by the way that such of the moveable property—indigo, and so on—as was in the hands of the judgment-debtor himself, and belonged to him, must have been manually seized by an officer of the Court; while so much of it as was in the hands of a co-shareholder for his benefit, would probably have to be attached by notice and proclamation. But whatever indigo or other moveable property was not effectually attached at that time, and whatever indigo and moveable property came into existence subsequently thereto, would remain unattached until some further valid act of attachment was done. Now it is important to bear in mind that none of the property attached, either moveable or immoveable, was in fact sold or ordered to be sold. On the contrary, satisfaction of the decree was sought to be attained by the process which is prescribed in the first part of section 243 of the Civil Procedure Code. That section in its first part runs thus: "When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses, or other immoveable property, it shall be competent, to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents or other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards the payment of the amount of decree and costs." It is to be observed, as we understand this section, that this proceeding does not change the property in the

ubject which is attached and affected by it. t seems to us that the manager so appointed y the Court, so far as he is an officer of the ourt, is at most the hand of the Court for e purpose of gathering in on behalf of the udgment-debtor the moneys due to him, in rder that they may be immediately applied the satisfaction of the decree, *i. e.*, to the scharge of the judgment-debt. If the manaer so appointed affects to do more than this, d deals with the subject of property itself—for instance, he carries on such a concern as e Seetulpore indigo concern, and works it as proprietor would work it, he must do so, our opinion, as the agent of the judgmentbtor, and not properly as an officer of the ourt. We need hardly here remark that, the original side of this Court, a question s been lately considered and discussed at me length as to what are the proper nctions, and what is the true *status*, of a eceiver, appointed by the Court in a Civil it, with the object of preserving property, d of keeping it within reach of the Court ntil a final decree can be made between the rties. We may, however, say, we consider to be quite settled that the Receiver, even that case, can but exercise at the utmost ch powers and rights over the property as e parties to the suit turn out to be possessed when those rights are finally determined. e does not, as seems sometimes to be imaned, in some mysterious way represent the ourt itself, and by virtue of its authority overde the parties and all the world besides. We o not know whether it has ever been held that e District Courts of this country have the thority to appoint a Receiver of such a haracter as that which we have just mened; probably they would be held to have , if it should become necessary in order mpletely to administer justice within their risdiction to make such an appointment. ut we do not at this moment remember any se in which such an appointment has been ade, and we believe that at any rate such ses, if they have occurred, are exceedingly re. But however this may be, the manager, ho has been appointed by the Judge's Court the present matter now before us, does not ace his authority to any general powers of e Court. He is certainly nothing other an such an officer as the Court is expressly thorized to appoint by section 243, and it ppears to us that the purpose of that section, far as concerns the appointment of a manag, is limited to the collection of moneys and oney-profits which may be due to the dgment-debtor, as we have already said. We are very strongly of opinion that it never was the intention of the Legislature, when it used the words of the first part of that section, to give a Court power to take the property of judgment-debtors into its own hands, and to manage it as of its own authority during a course of years for the benefit of certain favored judgment-creditors to the exclusion of all others. We think that if the Legislature had entertained the intention to confer such an extraordinary power, it would have expressed it clearly, and would have taken care to hedge the gift about with qualifications which are, as it seems to us, absolutely necessary to prevent the exercise of it from leading to very great mischief indeed.

It appears to us then that, notwithstanding the appointment of the manager in this case, the indigo concern of Seetulpore continued to be the property of the judgment-debtor, although, of course, it remained by reason of the attachment, so long and so far as the attachment was maintained and extended, inalienable as against the judgment-creditors in suits A and B, and that all the indigo in being at that time which was not actually attached, and all the indigo, then *in prospectu*, which was afterwards completely made, were entirely at the disposal of the judgment-debtor.

Next comes the mortgage which was made by the judgment-debtors, Abdool Hye and Mehndi Khanum, to Rughoonath, with the consent of Abdool Ali in both his capacities, and of course of the decree-holder Rughoonath, *i. e.*, the decree-holder in suit B. That mortgage, by reason of this consent, must, notwithstanding the previous attachment, be good against the judgment-creditors in suits A and B; and it must also be good, so long as it continues alive, and so far as it is operative, against all subsequent attaching decree-holders. We have not had the means or the opportunity, nor has it been necessary for our decision on the present application, that we should have been afforded the opportunity of making ourselves acquainted with the details of this mortgage. It is possible that the operation of it, by its terms, did not extend beyond a season; we do not know how that may be. But at any rate, even during the whole time of its being in force, it would leave some proprietary interest in the judgment-debtors; and it is quite clear to us that any judgment-creditor of these judgment-debtors, who, coming after the appointment of the manager, and the making of the mortgage, desired to have recourse to the property of the judgment-debtors in execution of a decree,

had a right, notwithstanding the existence of the manager and notwithstanding the existence of the mortgage, to attach and sell such property of the judgment-debtors or interest in the concern as remained to them, subject to the mortgage, as long as the mortgage subsisted, and independently of the mortgage whenever the mortgage was redeemed or ceased to operate.

Now we learn from the affidavit of Abdool Ali, which is put in by Rughoonath in this case, that, after the mortgage of 1869, other mortgages or one other mortgage at any rate, namely, the last one of the 5th February 1872, was made to Rughoonath. But in the interval, namely, on the 12th July 1871, the present petitioners obtained a decree in the Subordinate Judge's Court against Abdool Hye and Mehndi Khanum for Rs. 14,827. An application was made by them for execution of this decree by the attachment of Seetulpore indigo concern, indigo, and other property, which was refused by the Subordinate Judge on the ground that these properties were under the management of the Judge's Court, pursuant to section 243 of the Civil Procedure Code, for the purpose of paying off prior creditors, and that the Judge had issued a precept to him forbidding the attachment.

Now it is we think clear from what we have already stated, that at that time, inasmuch as the property, originally attached by the judgment-creditors in A and B, had never been sold in execution, it was at most still under attachment (although probably the mortgage alienation had done away with that), and we think it is also clear that there is nothing in the Civil Procedure Code to prevent the property which has been once attached from being afterwards attached by a judgment-creditor in another suit, if only this be done, before it has been sold by order of Court, and so the judgment-debtor divested of all rights to it. It may be a slight question, no doubt, in some cases how the second attachment should properly be effected. But that there is, in truth, no real difficulty in the matter is shown by the fact that second attachments have now been for years under the provisions of the Act, effected without any serious objection on the part of the prior judgment-creditors.

The Subordinate Judge was, therefore, manifestly entirely wrong in refusing the petitioner's application for attachment on the ground upon which he based his refusal, and the Judge's precept did not add any additional reason in his favor.

Accordingly, upon an application made to the High Court, an order was passed dated the 29th February 1872, directing the Subordinate Judge to exercise his jurisdiction, and to proceed in the matter of the execution without reference to the Judge's precept. Notwithstanding this order of the 29th February of the present year, the petitioners have not yet been able to obtain from the Subordinate Judge an effective order for attachment. They made formal application for it on the 15th July 1872 and an order was passed on the following day for attachment. An objection to this order for attachment was made by Rughoonath Pershad on the 18th July, and overruled. But for some curious reason or another, the attachment was not, in fact, made.

Again, on the 25th July 1872, the Subordinate Judge ordered the attachment to be effected by proclamation in Court and by notices directed to the Judge and the manager of the property. But as the Judge, on the 3rd August, sent back these notices, and refused to receive or carry out the requisite processes on the ground that Seetulpore factory was already under attachment, and that the indigo was mortgaged to Rughoonath, and that the judgment-debtor had no concern with the indigo, the Subordinate Judge, on the 10th August 1872, refused to issue the attachment, and in fact recalled his order of the 25th July, saying that the property was not the property of the judgment-debtor. It seems to us that in this the Subordinate Judge has exactly repeated the step which this Court on the 29th February last declared was wrong. He has irregularly, in consequence of a roobakaree from the Judge, refused to grant to the petitioners that order for attachment which they, as judgment-creditors in a suit in his Court, have a right to claim from him. It is not because the property which is sought to be attached is in the hands of third persons, or even in the hands of the manager of the Court appointed under section 243, that it is to be safe from attachment of all other creditors. The proper course for the Subordinate Judge to take is to attach the property which is pointed out to him in such a way as will make a valid attachment according to the nature of the property. If any person is aggrieved by the attachment when made he can come before the Subordinate Judge regularly according to law under the provisions of the Civil Procedure Code, and ask that the attachment be removed.

We do not think we are called upon on

is occasion to instruct the parties how the ticular property should be attached; and deed we are not sufficiently informed as to situation to be able to do so, nor is it ssible for us now to say how far the proerty is bound in favor of the mortgagee ghoonath as against the rights of the esent judgment-creditors. It may be at the manager, by virtue of the authority en him by the proprietor in the mortgagensaction antecedent to the present petiner's decree, is solely the agent of Rughooth and Abdool Ali, or even solely of ghoonath himself; or it may be, on the her hand, as the result of the successive dings with the property and the proceedgs which have been had that neither bdool Ali nor Rughoonath has the slightest ght to alienate the Seetulpore factory or s proceeds as against persons who must be ken to have an attachment dating back to ly 1871. We merely mean to say that s are not in a position now to decide as to e relative proprietary rights to the Seetulre factory and its proceeds of the different rsons who have now appeared before us. l that we say judicially is, that the Subormate Judge ought, at the request of the titioners, judgment-creditors, under a cree of the 12th July 1871, to have attached e property pointed out to him by the petiners according to the nature of the judgent-debtor's interest in it, as described by the plicants. It seems to us that he has wrongly two occasions refused to exercise that jurisction which he was bound to exercise upon e application of the judgment-creditors, and at he must now be directed to issue execution cording to their application. And we ink it must be added that the attachment w ordered to be made must, as against the rties to this rule, so far as is necessary to otect the interest of the petitioners, date as it had been made on the first application 1871.

As there has been some considerable conion apparently in the minds of both the dges of the Courts below as to the mode right attachment, we think we may perps safely add that so far as the property ught to be attached is moveable, if it be the hands of any one who can be consired as the Judge or the Judge's Court though we do not understand how it can ghtly be so), it must be attached in the ode prescribed by the first part of section 39; and, therefore, we think that the notice hich was once sent by the Subordinate dge to the Judge, although it was refused by the latter, was in truth an effectual attachment of anything in the shape of moveable property, if there was any such, in the hands of the Judge. The Judge could not make that no attachment which otherwise would be a good attachment by refusing to receive the notice. Also as to the immoveable property sought to be attached as property entirely or partially belonging to the judgment-debtor, and as property in the hands of other persons on his behalf, it would be similarly attached according to the provisions prescribed by the first part of section 239. As to the immoveable property, the parties will have no difficulty, for that must be attached in one way, and one way only.

The petitioners ought to have their costs, which we assess at Rs. 250. Costs are allowed as against all the respondents jointly.

The 10th December 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Construction—Interest—Order nunc pro tunc.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Gopee Kissen Gossamee

versus

Brindabun Chunder Sircar and another.

Mr. Leith and *Merivale* for Appellant.

Mr. Doyne and *J. Cutler* for Respondents.

On a question of construction of an order of Her Majesty, the words "the plaintiff is to have judgment for his moiety, with interest at the full legal rate, and the costs of the proceedings in the Court below" were held as intended to give plaintiff the moiety claimed by him of the sum which he alleged to be due for principal and arrears of interest (at 12 per cent.) equal to the principal upon a certain kurarnama and bond, and to allow the interest from the date of the institution of the suit up to realization:

HELD further that, in the account taken by appellant as the foundation for his proceeding in execution, he was not warranted in making a rest at the date of the order of the Principal Sudder Ameen dismissing the suit, and assuming that interest should run upon the consolidated sum from that date; as in the absence of special directions it could not be presumed that the Appellate Court intended to make an order *nunc pro tunc*, which would give compound interest from the date of the decree of the Court of first instance.

* From the judgment of Kemp and E. Jackson, JJ., in Miscellaneous Appeal, No. 80 of 1870, decided 7th July 1870.

Sir James Colvile.—THEIR Lordships cannot but regret that the litigation to which the former order of Her Majesty might reasonably have been expected to put an end, has been prolonged by the proceedings which have led to the present appeals.

Their Lordships are first called upon to construe the order of Her Majesty of the 7th August 1869, in respect of what may be termed the principal sum thereby awarded. The words of the order are that the plaintiff is to have judgment for his moiety, with interest at the full legal rate, and the costs of the proceedings in the Court below. The first question is, what is meant by his moiety? Upon that point their Lordships entertain no doubt that the order intended to give to the plaintiff the moiety claimed by him of the large sum of Rupees 69,000 odd, which he alleged to be due for principal and arrears of interest equal to the principal upon the kurarnama and bond. That that was what the plaintiff was suing for is shown by his plaint, and by the account in the nature of particulars of demand which is annexed to the plaint. We, therefore, start with a decretal order awarding to the plaintiff Rs. 34,865-6-7 as the principal sum recoverable in the suit.

Their Lordships may observe, with reference to the question, whether the kurarnama carried interest, which the respondents have tried to raise on the present occasion, that it would be impossible for their Lordships, whatever view they might entertain, to go behind the former order, and to allow any matter concluded by that order to be reargued on this appeal. Nor does there seem to be any reason to doubt but that it was properly decided on the former appeal that the kurarnama did bear interest.

Her Majesty's order, then, awards Rs. 34,865-6-7 with legal interest, that is, interest at the Court rate of 12 per cent. And looking to the course of the Courts in India, their Lordships are of opinion that it was the intention of the order to give that sum with interest at that rate from the date of the institution of the suit up to realization.

The question then arises whether, in the account which was taken by the appellant as the foundation for his proceeding in execution, and which is embodied in the petition for execution, he was warranted in making a rest at the date of the order of the Principal Sudder Ameen which originally dismissed the suit, and in assuming that, inasmuch as that sum with interest ought then to have been awarded to him with costs, interest should run upon the consolidated sum from that date. Their Lordships are of opinion that, notwithstanding the passage which has been cited from Mr. Macpherson's book, they are not warranted in giving that interpretation to the present order, considering the terms in which it is expressed. They have the benefit of being assisted on this occasion by Sir Barnes Peacock, who has had so much experience in the High Court in administering the present Code of Procedure. And although the Appellate Court might have the power, if it thought fit, to make such an order as it is suggested would have been made according to the former practice, it is now, we understand, quite as common to give, on appeal, merely a decree for the principal sum awarded, with interest from the commencement of the suit to the realization of the sum. And, in the absence of any special directions, it cannot be presumed that there was an intention to make an order *nunc pro tunc*, which would have the effect of making a rest at the date of the decree of the Court of first instance, and of giving compound interest awarded from that date.

Their Lordships, therefore, think that upon that point the petition of the appellant sought for too much. In other respects they are with him, and they are with him upon the principal question which has led to these appeals.

The order which their Lordships propose humbly to recommend Her Majesty to make will be the following: "Declare that "the appellant, under the order of Her "Majesty of the 7th August 1869, was "entitled to the sum of Rs. 34,865-6-7 with "interest at 12 per cent. from the com-"mencement of the suit to the date of Her "Majesty's order, with the costs in the "Courts below. Also declare that he is enti-"tled to interest at the rate of 12 per cent. "on that consolidated sum from the date of "the order to the date of realization; and "declare that he is further entitled to the "sum of Rs. 3,289-2-4 for the costs of the "former appeal, and also to the costs in the "Indian Courts incurred in the proceedings "for execution, and to the costs of this "appeal. And let the cause be remanded "to the High Court, with directions to cause "execution to issue accordingly." Their Lordships have not thought fit to recommend that the appellant should be allowed interest on the costs of the former appeal, since they understand that, according to

practice, costs given here do not carry interest unless the contrary is expressed in the order.

With regard to the cross-appeal of the respondents, Brindabun Chunder Chowdhry and Sreesh Chunder Sircar Chowdhry, their Lordships will humbly report to Her Majesty that their appeal ought to be dismissed with costs.

The 17th December 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Joint Property—Partition—Cause of Action.

Case No. 90 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 23rd January 1872.

Juggo Lall Oopadhya (Defendant), *Appellant,*

versus

Manoohur Lall Oopadhya (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondent.

In a suit between brothers who had been in joint possession of property of various kinds, and carried on joint business until an alleged recent partition, where plaintiff sought to recover a proportion, equal to his share, of a sum of money said to have been taken by defendant from the joint funds:

HELD that unless the plaintiff could show that all the joint property had been divided, excepting the sum in question, or that all the property had been divided and on an adjustment of accounts of past expenses there was a loss equal in amount to that item, he had no cause of action to sue for a moiety thereof.

Phear, J.—THE plaintiff and the defendant in this suit are brothers, who, until very lately, were in the joint possession and enjoyment of very considerable property of various kinds. The suit was brought on the 24th July 1871, and it appears that although at that time partial partition of the property had been effected between them, there still remained some portion of the property which was not divided.

The plaintiff in this suit seeks to recover Rs. 7,265-10 principal, and Rs. 1,983-8 interest upon a right of action which he thus states: "While the business was "jointly carried on, the defendant took "from the joint funds notes of Rs. 15,500 "on the 21st and 22nd Srabun 1925 Sum-"but (corresponding with the 25th and 26th "July 1868), and appropriated them to his "exclusive use. Notwithstanding the exe-"cution and completion of the ikrarnama, "dated the 30th March 1869, stipulating to "effect partition of the real and personal "properties, ancestral and acquired, in the "names of the parties or in those of other "persons, the defendant has not, though "repeatedly asked, paid Rs. 7,265-10, "which is due by the defendant in propor-"tion to your petitioner's 7½ annas share in "the entire sum of Rs. 15,500, after deduc-"tion of Rs. 8,234-6 in proportion to his "(defendant's) 8½ annas share. Hence the "suit."

The plaintiff goes on to state "The "cause of action against the defendant arose "on the 15th April 1869, the date on which "the defendant was, after the completion of "the said deed, asked for, but did not make "the payment."

The defendant, amongst other things, objected that the plaintiff had shown no right of action, and, as the Subordinate Judge says, placed this issue upon two grounds: *First,* "that the suit is opposed to the stipula-"tions contained in the solehnama of the "30th March 1869;" and, *secondly,* "that "before partition of all the effects of the "family, it was not competent to the plain-"tiff to sue for the division of a particular "item."

The Subordinate Judge overruled both these heads of objection, and decided the first issue in favor of the plaintiff, holding that that plaint did disclose a complete cause of action.

It seems to us that in this the Subordinate Judge was wrong. The plaint which we have read not only does not state that a partition of the property had been effected, excepting so far as concerned this item of Rs. 15,500, but even, as we think, shows very clearly that no sort of complete partition had been arrived at between the parties. It states that an ikrarnama was made on the 30th March 1869, "stipulating to effect partition of the real and personal properties, ancestral and acquired," and that "the cause of action against the defendant arose on the 15th April 1869, the date on which the defendant was, on the completion of the said deed, asked for, but did not make the payment." It appears to us from these

statements in the plaint that the plaintiff purposely abstained from saying that all the property had been divided excepting this outstanding, Rs. 15,500, in the hands of the defendant, and the only reason that we can suppose existed for his so abstaining is that it was not the fact that a complete partition had been come to; and according to the finding of the Subordinate Judge, it appears also, we think, that, as a matter of fact, such a complete partition had not been made, because he says, in meeting the objection, that, before partition of all the effects of the family, it was not competent to the plaintiff to sue for the division of a particular item; he says: "A part at least of the joint estate "appears from the statements of both the "parties to have been divided. If the "defendant keeps back from the partition a "portion of the common fund, and declines "to give to the plaintiff his share of it, the "plaintiff is not, in our opinion, debarred "from bringing a suit for the recovery of "his share; nor do I think the defendant is "put to any unfair disadvantage in conse-"quence of such suit; for, should the "plaintiff have, in his turn, taken to himself "any money without accounting for it to "the defendant, there is nothing to prevent "the latter from seeking a similar redress."

The plaintiff then, at the time when the judgment was passed, had not found himself in a position to satisfy the Judge that a partition of all the property, excepting this sum of Rs. 15,500, had been effected between himself and his brother. But it seems to us that, under the circumstances which have been disclosed as to the relation of these two parties, unless the plaintiff can show that all the joint property had been divided excepting this item, or that all the property had been divided, and, on an adjustment of accounts of past expenses, there was a loss equal in amount to this item, he had no cause of action to sue for and to obtain a decree giving him one-half of it. We think, therefore, that this suit ought to be dismissed.

The defendant took this objection at the first possible opportunity, and supported upon just ground. We do not think that we ought to refuse to give him the benefit of that objection now, if we think that the Judge in the Court below was wrong in not acting upon that objection in the first instance. In this view, inasmuch as it seems to us that the plaintiff's suit must fail, because he has not succeeded in showing the cause of action, it becomes unnecessary for us to express any opinion upon the other branch, as we may call it, of the first issue, namely, whether or not the suit is opposed to the stipulation contained in the solehnama of the 30th March 1869. We may venture, however, to say this much, that we think that objection necessitates very careful consideration of the terms of the said ikrarnama, and that, in our judgment, it has not been very thoroughly dealt within the judgment of the Subordinate Judge.

We think the plaintiff's suit must be dismissed with costs in both the Courts.

The 19th December 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Suit for possession (or ejectment) by mortgagors.

Cases Nos. 219 and 223 of 1871.

Regular Appeals from a decision passed by the Judge of Patna, dated the 25th July 1871.

Mussamut Ameena Begum and others (Defendants), *Appellants,*

versus

Mussamut Doordaneh Khanum and others (Plaintiffs), *Respondents.*

Baboos Hem Chunder Banerjee and *Mohesh Chunder Chowdhry* for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Respondents.

In a suit for possession by parties claiming as mortgagors against two defendants, *viz.*, (*1st*) the representatives of the original mortagees; and (*2nd*) certain parties who were alleged to have effected, in collusion with such representatives, a fraudulent transfer of the property from their hands into another name:

HELD, with reference to the shape of the suit which was one for possession (*i. e.*, according to English legal phraseology a suit for ejectment), and which was found to be barred by limitation against defendant No. 2, the decree could be rightly given against defendants No. 1, who were in no sense in possession.

Phear, J.—THIS is a suit of a somewhat unusual character. It is brought against two sets of defendants described in the plaint itself as defendants No. 1 and defendant No. 2. The plaintiffs claim as heirs of one Hossainee Begum, or as persons who are entitled to recover by her right. They say that Hossainee and her brother in the year 1238, just forty years before the suit, leased

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rtain property to the ancestor of the defendants No. 1 at a rent of Rs. 290 in the whole; and that four years afterwards, namely, in the year 1242, Hossainee alone (her brother having died in the meanwhile), by a bond, pledged this property so leased with the lessee as security for repayment of a sum of money which, converted into current rupees, is Rs. 1,062-8. They say further that this loan was paid off by the usufruct at the end of the year 1248; that Hossainee, who was then alive, did not thereupon enter into or obtain the enjoyment of the rent reserved in the lease, but died in 1249, without having done so, and was succeeded in her rights and property by her uncle Hazem Ali; that Hazem Ali, who lived for twenty years after this date, also did not get the enjoyment of this property or receive the rents. They admit, however, that during that time he brought a redemption-suit for the purpose of recovering the subject of the lease from the ancestor of defendants No. 1, and failed in the suit, because he was, for some reason or another, induced not to appear on the day of the trial.

The plaintiffs' case further is that Hazem Ali died in 1269, and that they then became entitled to his property or proprietary rights as his heirs.

They go on to allege that in 1860, ten years before the date of the present suit, Ameena Begum, the second of the defendants No. 2, pretended to grant a mokurruree of this property, which was the subject of the mortgage-bond, to the first of the defendants No. 2, Sheo Sahoy Lall; and that this proceeding on her part was effected in collusion with defendants No. 1 for the purpose of fraudulently transferring the property from the hands of the mortgagees represented by the defendants No. 1 into another name, and of preventing the plaintiffs from recovering on the strength of their mortgage.

On the state of facts (represented in, or apparent from, the plaint), they seek to obtain a decree for possession from both sets of defendants, and say that they will postpone to some future time the bringing of a suit for mesne-profits in respect of the period during which the mortgagees have been holding the land since the mortgage-debt was paid off or satisfied by the usufruct. It is, therefore, apparent from the statements in the plaint itself that the plaintiffs and those through whom they claim have had no beneficial enjoyment of the property, which is the subject of the suit, for just thirty years previous to the date when the plaint was filed. The suit itself is in the nature of a redemption-suit as against the first set of defendants, and, therefore, ought to ask for the full remedy which the plaintiffs are entitled to claim from defendants No. 1 on the footing of the mortgage-relation. Yet the plaintiffs abstain from asking for the mesne-profits, which, according to their case, had accrued due in respect of a very long period indeed, and they put the suit into the simple form of ejectment in order to obtain a binding decree against defendants No. 2, who, according to their own showing, are strangers to the mortgage-transaction altogether, and can only be brought into this suit at all jointly with the defendants No. 1, upon the ground that, by their fraud, they identified themselves with the defendants No. 1 in their character of mortgagees. It, therefore, seems to us almost impossible to avoid coming to the conclusion, from the perusal of the plaint itself, that this suit is merely tentative in its nature, and we may even say speculative. Certainly it is one in which it behoves the plaintiffs to make out a strong case, and, amongst other things, to explain on some reasonable ground how it happened that they and their predecessors in title for a period, as we have said, of thirty years, have abstained from any serious endeavour to obtain the enjoyment of this somewhat considerable property. We say considerable, for we remark that the rent reserved upon it in 1238 was Rs. 290, and we suppose that the proper rent for the same property must be much larger than that at the present time after the lapse of forty years and upwards. Yet there has not been, from beginning to the end of the evidence adduced, an attempt to account for this remarkable abstinence on the part of the plaintiff's predecessors. The plaintiffs came into Court resting simply upon this one basis for their claim, namely, "We "are the representatives of the original mort-"gagors, and both of you are people who are "in the situation of mortgagees."

On the other side, the defendants No. 2, who are, so to speak, strangers, say, we have been in the enjoyment of this property as of right for a period greater than the period of limitation, and therefore the plaintiff's suit is barred. But the truth further is, they add, that it is Ameena (and for a time her sister), our vendor, and not your side of the family, who has all along been in the actual enjoyment of the property. And it seems to us, upon looking at the evidence, that the testimony of the witnesses lies all one way

on this point. As we have already remarked, the plaintiffs do not pretend to show any enjoyment on the part of themselves or their predecessors, and it is rather a significant fact against them that Hazem Ali did once try to obtain possession in some fashion, and for whatever cause failed. Then, on the defendants' side, there is undoubtedly the act of ownership involved in the granting of the mokurruree pottah by Ameena in 1860, which is admitted by the plaintiffs themselves, because they seek in their plaint to set aside that deed as being hostile to their rights, and there is no real attempt in the examination, or rather the cross-examination of the defendants' witnesses, to make out that the enjoyment of the property since 1860 has been other than consistent with the terms of that transaction. So that almost on the showing of the plaintiffs themselves, there has been adverse enjoyment by the defendants No. 2 of this property for certainly upwards of ten years.

Then, there is evidence given by the defendants' witnesses of the payment of rent on account of this very zur-i-peshgee lease to Ameena and her husband. We would not say, judging merely by the depositions on the record, that this evidence is altogether so good in its character as the Court had a right to expect that it should be at the hands of parties in the position of the defendants No 2. Still there it is, and it is practically unimpeached by anything in the case. And, finally, there is the account which was made up in 1860, and formed the consideration for the granting of the mokurruree lease.

In view of this body of evidence on one side, we feel ourselves unable to come to the conclusion which the Subordinate Judge appears to have arrived at, namely, that the defendants had not made out a case of possession for a period of twelve years. It seems to us that the defendants have really shown a possession which extends as far back as the date of the death of Hossainee, and the plaintiffs have totally failed to establish any such fraud (or indeed any fraud at all) on the part of the defendants No. 2, as is necessary, if the plaint be treated as an application to redeem, to put them in the position of the original mortgagees, or their representatives defendants No. 1. As far as we can see, there has been a *bonâ-fide* possession on the part of Ameena as of right for a very considerable length of time. We fail to see upon the evidence any reason for treating her as if she had obtained the property from the mortgagee either by purchase or fraud, or for any other reason was relative to the plaintiffs in the position of mortgagee of this property.

On the whole, then, we think that the plea of limitation ought to be upheld, and that so far as regards the defendants No. 2 the suit ought to have been dismissed.

As regards the defendants No. 1, the matter is not altogether so simple. They unquestionably are the representatives of the original mortgagee, and we think also that the plaintiffs have established that they are the persons entitled to claim as mortgagors. But it follows from what we have said with regard to the case made out by the defendants No. 2, that the defendants No. 1 are not in possession of the property. Now the suit has been, we suppose, advisedly put into the shape of a suit for possession only; that is, according to English legal phraseology, it is simply a suit for ejectment; and as the defendants No. 1 are, in no sense, in possession of the property according to the facts made out by the evidence, a decree for possession cannot rightly be given against them. It may well be that they have committed a breach of trust as against the plaintiffs, and for that reason are liable to make good the loss to them, or perhaps we should say might have been made liable in a suit properly framed for that purpose. Be this as it may, in this suit it seems to us that a decree against them for possession and for damages in the shape of mesne-profits, until that possession shall be given, is a wrong decree, and we need not stay to point out what inconvenience a decree for damages under the circumstances we have mentioned, in the shape which the Subordinate Judge has given to it, would lead to. On the whole, therefore, we think the suit should be dismissed against the defendants No. 1, as well as against the defendants No. 2.

The suit must be dismissed with costs in both the Courts.

The 20th December 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Execution—Interest.

Case No. 258 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 26th June 1872.

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ajah Rughoonundun Singh Bahadoor and another (Decree-holders), *Appellants*,

versus

. Alexander Arcott (Judgment-debtor), *Respondent*.

urs. *R. E. Twidale* and *C. Gregory* for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

here a decree awarded a certain sum which was ulated in the schedule, *plus* costs and interest, the t executing was held to have committed an error in ing the amount somewhat by reducing the rate of est during the pendency of the suit.

he same Court was pronounced not to have done g in estimating the interest, the rate of which was specified, at a rate which, under all the circumstances he case, it thought reasonable.

Phear, J.—It appears that the decree ards to the plaintiffs a certain sum of ney which is calculated in the schedule, s costs, *plus* interest. It does not in ms say at what rate that interest is to be lculated.

The Subordinate Judge has somewhat ered the amount in the schedule, as we derstand, by reducing the rate of interest ring the time of the pendency of the suit. e think if he has done this, that he has mmitted error, and that the decree must nd for as much as was calculated in the edule.

The Subordinate Judge has further estiated the interest, the rate of which was not ecified in the decree, at the rate of 4 annas r month, or Rs. 3 per cent. per annum.

It is urged by Mr. Twidale that he ought have taken the indefinite term interest to ean interest at the rate which had been warded for the previous period, namely, 24 r cent., or, at any rate, the rate of interest hich is usually awarded in ordinary cases in hich a decree for interest is made by Civil ourts in their discretion, and which, he ys, is 12 per cent. We are not at all sure that e Judge might not very rightly have said at, inasmuch as the Court which passed e decree has abstained from stating the te at which the interest, subsequent to the ecree, was to be calculated, he could not tisfy himself as to what the Court really eant in its discretion to award, and on that round have refused to issue execution for ny interest at all. He has, however, not aken this course, but has understood the ord interest without express definition of ate, to mean such a rate as, under all the circumstances of the case, is reasonable; and he thinks Rs. 3 per annum is, under all the circumstances of the case, reasonable. Although, as we have said, we would not have been surprised if the Subordinate Judge, under the circumstances, had refused to give any interest at all, we are not prepared to say that he is wrong in the course which he has taken. We shall, therefore, not interfere with his decision in this respect.

In the view of the case which we have taken, we think that each party should bear his own costs of this appeal.

The 3rd January 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Arbitration Award—Appeal—Award by Majority.

In the Matter of

Junglee Ram, *Petitioner*,

versus

Ram Heet Sahoy, *Opposite Party*.

Baboo Nil Madhub Bose for Petitioner.

Baboo Rughoobuns Sahoy for Opposite Party.

An appeal lies where the reality of an arbitration award is questioned on the ground of there having been no valid submission to arbitration.

Where the terms of such submission give no authority for the majority of the arbitrators to make the award, it should be made by the whole of the arbitrators.

Couch, C. J.—The rule must be discharged and with costs.

According to the decision of the Full Bench, a decision of four of the Judges (one of them, Mr. Justice Phear, dissenting), an appeal lies where the question which is raised is whether there was in reality an award; whether, by reason of there being no valid submission to arbitration, or of its having been revoked, the persons professing to make an award had no authority to do so. We say nothing as to whether we agree with that decision or not. We take it as binding upon the Court according to its rules, and it is not necessary to express an opinion upon it. Taking it to be the law, this case comes within it, because the question which was raised was whether the parties did agree to submit the matter to arbitration, and it is upon this that the Subordinate Judge decided. He held, whether

erroneously or not is not for us now to consider, that there was not a valid submission to arbitration, because there was no writing.

But the application which was made to us ought to be refused on other grounds besides the decision of the Full Bench, because the award appears to have been signed by five only out of six arbitrators, and there is nothing to show that there was, by the terms of the alleged submission, an authority for the majority of the arbitrators to make the award. In the absence of such authority, the award ought to be made by the whole of them. Therefore, it would not be proper for this Court to interfere now, and by setting aside the decision of the Subordinate Judge as made without jurisdiction, to give the effect of an award to that which does not appear to have been a valid one, it not being signed by the arbitrators who ought to sign it.

Again, the applicant is in this position. In the first instance, when he sought to have the award filed and executed, the Moonsiff refused his application, which was in the form of a suit to recover the money due upon the award. The Moonsiff appears to have treated it as an application under section 327. If it is to be considered as a suit, and not an application under that section, an appeal would lie; but if, as is now contended for, the proceedings are under section 327, no appeal lies, and the applicant had no right to have an appeal in the first instance, and to have the first order of the Moonsiff set aside.

Upon the whole case, we think it clear that it is not one in which this Court ought to interfere by exercising the power which is conferred upon it by the Act of Parliament of superintending the Courts and setting aside proceedings which are bad without jurisdiction.

The rule must be discharged with costs which we fix at two gold mohurs.

The 3rd January 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, *Judge.*

Will—Hindoo Widow—Disinherison—Gift.

On Appeal from the Judgment of the Hon'ble A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

Tarucknath Sircar (Defendant), *Appellant,*

versus

Prosono Coomar Ghose (Plaintiff), *Respondent.*

Messrs Woodroffe and *Mr. Branson* for Appellant.

Messrs Kennedy and *Mr. Mun Mohun Ghose* for Respondent.

A Hindoo, who had two infant sons, made a will, which was drawn up by an English attorney in the English language, but which he signed in Bengalee, in the following terms: "I give, devise, and bequeath unto my wife "Sreemutty Luckeymoney Dossee, and her heirs and "assigns for ever, all my real and personal estates and "effects, and do appoint my said wife sole executrix "of this my will:

HELD that it must be assumed that the will was explained to the testator, and that he understood its meaning; for, if it was not, and he did not understand what he was signing, there would be no question of construction, it would not be his will:

HELD that, under the terms of the will, the testator intended his wife to be something more than a trustee or manager for the infant heirs, and that she took absolutely all the property of the testator.

It is not necessary that there should be an express declaration of a desire or intention to disinherit sons if there is an actual gift to some other person expressed in clear and unequivocal words.

THE following is the judgment of Macpherson, J., which was appealed against:—

The subject of dispute in this case is certain property which belonged to one Hurronundo Sircar.

The plaintiff and the defendant are both grandsons of this Hurronundo Sircar, but, unfortunately for the defendant, according to the Hindoo law, occupy very different positions; the plaintiff being the son of a son, while the defendant is the son of a daughter.

Hurronundo Sircar died in 1833, leaving a widow Luckeymoney Dossee and two sons, Shamachurn and Woomachurn, and a daughter Roymoney. Shamachurn died in 1849 without issue, but leaving a widow Rampreosi Dossee, who died in 1855 or 1856. Woomachurn died in 1854, leaving one son, the plaintiff. Roymoney, the daughter of Hurronundo, is still alive, and the defendant Prosono Coomar Ghose is her son.

Supposing Hurronundo Sircar to have died intestate, so that his sons Shamachurn and Woomachurn succeeded to his property according to the ordinary rules of Hindoo law, the whole estate would now belong to the plaintiff to the exclusion of the defendant, for Shamachurn and Woomachurn would have taken in equal shares. On the death of Shamachurn, his widow, Rampreosi, would have taken a widow's life-interest in his share

of the estate. Upon her death, his mother Luckeymoney Dossee would have succeeded; and on Luckeymoney's death, the share would have gone to the present plaintiff as the next heir of Shamachurn.

The real state of the case, however, is that Hurronundo Sircar died leaving a will, and the defendant, Prosono Coomar Ghose, contends that, under that will, his whole estate vested absolutely in Luckeymoney to the entire exclusion of his children, and that Luckeymoney Dossee in her lifetime made a gift to him (the defendant) of six annas share of the family dwelling-house, which is the subject of this suit. There is no doubt that the question which has been raised is one of great importance to Hindoos as bearing upon the question of principles upon which the Courts ought to act in constructing wills made by Hindoos.

Hurronundo Sircar made a will in English, which was apparently prepared by an English attorney, but which is signed by the testator himself in Bengalee. It consists of only a few lines, and the following is the material part of it:—

"I give, devise, and bequeath unto my wife, "Sreemutty Luckeymoney Dossee, and her "heirs and assigns for ever, all my real and "personal estates and effects, and do appoint "my said wife sole executrix of this my "will." Luckeymoney Dossee, in February 1834, obtained probate of this will from the Supreme Court, and from that time onwards until her death in October 1858, she had the control and management of the property left by her husband, and dealt with it as if it was her own.

At the same time, however, her sons Shamachurn and Woomachurn, who were young children at the time of the death of their father, always lived with her, and substantially had the enjoyment of this property along with her; and on the evidence of the defendant Prosono Coomar himself, it appears that Shamachurn and Woomachurn, after they attained to years of discretion, used to assist her in the management of the property, although everything was done in her name.

Luckeymoney, on one or two occasions, sold portions of the property which belonged to Hurronundo's estate; and on these occasions, the conveyances were made by her. One of these conveyances, dated the 3rd of February 1849, has been put in, and in that she states that she sells the property, her husband having given a turneenamah ("will") in her name. While this bill of sale was given by Luckeymoney as being the person having the right to convey, it is to be noticed (and it is a material fact) that both Shamachurn and Woomachurn, the two sons who were the natural heirs of Hurronundo Sircar, signed the conveyance as witnesses, a proceeding well understood among natives as indicating that their sons being parties, having an interest, gave their consent to the sale being made.

Shamachurn's widow, Rampreosi, having died, we find that, very shortly thereafter, Luckeymoney executed a deed of gift to the defendant Prosono Coomar Ghose of the property which is the subject of this suit. That deed of gift is dated the 18th of October 1856, and in it the property is described as being property "which was given (to me), and has been held and enjoyed by me up to this time."

Two or three months before her death, Luckeymoney made a will in which she says: "My late husband, Hurronundo Sircar, "having made a will on the 22nd day of September of the English year 1833, granted "all his moveable and immoveable property "to me. Thereafter upon his death, I, having obtained the whole of his property by "virtue of his will, am possessing and enjoying the same from that time up to the "present as owner of the right of gift (and "sale thereof), and I have alienated some of "those properties." Then she says that she has already given, out of the properties granted by her husband, a six annas share of the family-house to the defendant Prosono Coomar Ghose by deed of gift, and she goes on to bequeath the remaining immoveable properties which she then had and her entire moveable property to her son's son Tarucknath Sircar. She then proceeds to appoint the defendant Prosono Coomar Ghose as executor and manager during the plaintiff's minority, and to declare that the whole estate should go to Prosono Coomar Ghose absolutely in the event of the plaintiff dying a minor without issue, or of his renouncing the Hindoo religion.

This will confirms the view that Luckeymoney herself considered that she was absolute owner of the property, and had the right to dispose of it at pleasure. And I have no doubt the whole family thought the same thing. Thus we find that, during the minority of the plaintiff, his mother filed a bill in equity in the Supreme Court against the present defendant Prosono Coomar Ghose, the object of which was merely to have Luckeymoney's will construed, and to have an account of her estate taken, no

question being raised in that suit as to the rights of Luckeymoney under Hurronundo's will, or as to the rights of the plaintiff as heir of Hurronundo or of Shamachurn. These proceedings are only material now as showing that some years ago the plaintiff's mother and guardian did practically treat Luckeymoney as having a good and absolute title under the will to the property of Hurronundo Sircar.

The plaintiff attained the age of eighteen years, as he states in his plaint, some time in the year 1871, and taking advantage of his exemption from the ordinary provisions of the law of limitation by reason of his minority, he now seeks for a declaration that Luckeymoney did not, under the will of Hurronundo Sircar, become the absolute owner of the property, and that she had no right to alienate any portion of it, or to give to the defendant the six annas share of the dwelling-house which she gave by the deed of the 18th October 1856. The plaintiff's contention in fact is that although, according to the literal meaning of the words used in Hurronundo's will, the whole estate of Hurronundo Sircar was given to Luckeymoney absolutely, still on the proper construction of the will, that is to say, if the will be construed not with reference to English law, but with reference to Hindoo law and to the habits and customs of the Hindoos, the Court ought to hold that the will gave her no absolute interest, but merely appointed her to be trustee and manager of the estate for the benefit of the sons of the testator.

I think that the plaintiff's contention is right. Considering that the will is the will of a Hindoo—considering that he had at that time two infant sons—and considering that there is no expression or indication anywhere of a desire to disinherit his sons, and that there was no reason why he should desire to disinherit them, I think I must assume that he did not mean to disinherit them, and that the will must be read as merely making over the property to the wife to be held by her in trust for the infant heirs. I agree with Mr. Justice Phear in what he says in his judgment in the unreported case of Rooploll Khettry *vs.* Mohimachurn Roy (decided on the 12th of September 1870). I think it is impossible to assume that a Hindoo means to disinherit his only sons when there is no express declaration of his desire or intention to do so, and when no cause is shown why he should have such a desire or intention. A recent decision of the Privy Council in the case of Raj Luckee Dabee *vs.* Gokoolchunder Chowdhry* (13 Moore's Indian Appeals 209) has some bearing on the question.

As I am of opinion that Luckeymoney was merely a trustee or manager for the sons, the question arises whether Woomachurn, through whom the plaintiff claims, having lived up to 1854, which was many years after he became of full age, it can be said that he by not contesting the matter with his mother was, at the time of his death, barred by limitation. For, of course, if Woomachurn was barred, the plaintiff would be barred now.

I think that under the circumstances Woomachurn was not barred. Luckeymoney was in the position of a trustee, and although the property stood in her name, and was dealt with as belonging to her, her possession and enjoyment were not adverse to her sons; for it is admitted that they lived with and were supported by her, and in fact that, after they attained their majority, they managed the property for her. It is noticeable that the gift from Luckeymoney to Prosono Coomar Ghose was not made until the death of both the sons and of Shamachurn's widow. It may well be that Luckeymoney, who up to that time dealt with the estate as manager for her children, might have thought that her sons and the widow of Shamachurn being dead, there was nothing unfair in her falling back on the terms of the old will, and giving a six annas share of the family dwelling-house to the defendant who, so far as blood is concerned, was as nearly related to Hurronundo Sircar and herself as was the plaintiff.

I think there was no adverse possession between Luckeymoney Dossee and her sons, and that she was a mere trustee and manager of the estate of Hurronundo Sircar, that is, up to the year 1858; and therefore the plaintiff, notwithstanding the long time that has elapsed, and notwithstanding the fact that his father during his lifetime did not contest the matter, is not barred.

Taking this view of the case, it is unnecessary to enter on the further question raised and argued, namely, supposing this property went to Luckeymoney as a gift to her by her husband after marriage, and became her stridhun, whether or not the plaintiff would succeed on her death as her heir? I express no opinion whether or not the plaintiff has made out his title to this property, if it was stridhun of Luckeymoney.

The plaintiff is entitled to recover the six annas share of the dwelling-house; and as

* 12 W. R., P. C., 47.

r. Kennedy, on behalf of the plaintiff, ives his right to an account, I shall give decree for possession and costs on scale p. 2.

Mr. Woodroffe (for appellant).—This is ase which arises on the construction of a ll. My client was the defendant in the it. The plaintiff, Tarucknath Sircar, brought suit against Prosono Coomar Ghose, my ent, for the purpose of having his right der the will of Hurronundo Sircar ascerned; for a declaration that Sreemutty ckeymonee Dossee had no power under said will to devise the property included rein; for possession of the entire family elling-house and of the piece of land in occupation of the defendant; for an count of the moveable and immoveable ate of Hurronundo Sircar and Sreemutty ckeymoney Dossee; and, if necessary, for e appointment of a Receiver. The facts are ted in the plaint.

The question is as to the construction of t will. My client contends that Luckeyney Dossee could, under that will, alien, rise, and part with that property as she eased. The learned Judge has held that t will only made Luckeymoney Dossee stee for the two sons of the testator.

My contention is:—

1st—That this will of Hurronundo Sircar d, according to its plain literal grammatical erpretation, confer on Luckeymoney Dos- an absolute estate and interest in the operty therein comprised.

2nd.—That, assuming that the will of urronundo Sircar did operate so as to vest s property as stridhun in the widow, the fendant's mother who was alive when the it was brought, and not the plaintiff, is titled to the property.

3rd.—That, before that question of strihun is raised (and logically this ground ould have come as 2nd), whether or not, ving regard to the texts of Hindoo law th respect to stridhun, testamentary gifts e in the nature of stridhun. I have not en able to find any case which affirmed the oposition one way or the other, but the ts speak throughout of gifts *inter vivos*, d the definition which is given of strihun is that property which a husband canot dispose of.

4th.—That the plaintiff's suit is barred by mitation even supposing that the will of urronundo Sircar is to be construed as it s been by the learned Judge. I shall cond that section 2, Act XIV. of 1859, which lates to the case of trusts, and provides that there shall be no period of limitation against trustees, does not apply to the case of implied trusts.

Upon the first point, *viz*., what was the construction of this will, the highest authority has laid down that, whether, with reference to Hindoos or to persons of other nations, the language in which persons express themselves is that to which recourse is primarily to be had in order to gather what was the intention of the testator. In 6 Moore's I. A. 550,* Soorjeemoney Dossee *vs*. Denobundoo Mullick, their Lordships of the Privy Council say: "This, therefore, is the question "which we are called upon to decide. It is "a question between the estate of Surroop-"chunder and the parties claming under the "gift over; and as it seems to us, it must "depend wholly on the construction of the "will. In determining that construction "what we must look to is the intention of "the testator. The Hindoo law, no less "than the English law, points to the inten-"tion as the element by which we are to be "guided in determining the effect of a testa-"mentary disposition; nor, so far as we "are aware, is there any difference between "the one law and the other as to the materials "from which the intention is to be collected. "Primarily, the words of the will are to be "considered. They convey the expression "of the testator's wishes; but the meaning "to be attached to them may be affected by "surrounding circumstances; and where "this is the case, those circumstances no "doubt must be regarded. Amongst the "circumstances thus to be regarded is the "law of the country under which the will is "made, and its dispositions are to be car-"ried out. If that law has attached to par-"ticular words a particular meaning, or to a "particular disposition a particular effect, "it must be assumed that the testator, in the "dispositions which he has made, had re-"gard to that meaning or to that effect, unless "the language of the will or the surrounding "circumstances displace that assumption. "These are, we think, the principles by "which we ought to be guided in determin-"ing the case before us; and we must first, "therefore, consider what was the intention "of this testator to be collected from the "words of his will."

They go on to say: "The will of a tes-"tator must *primâ facie* at least be taken to "refer to that which is the subject of his "disposition—the property which he has

* 4 W. R., P. C., 114.

"himself to give; and if he has evinced his "intention to give that property, very strong "and clear language must be required to "countervail that intention, and subject the "property which he has once given to his "further disposition."

Then their Lordships say: "If, there-"fore, we are to impute to this testator any "intention different from that which is to be "collected from the words of his will, it "must be upon the ground that there are "extrinsic circumstances which disprove the "expressed intention, and prove the different "intention. The expressed intention ought, "as we conceive, to prevail, unless the "different intention be clearly demonstrated. "We may doubt whether the testator really "intended what his words import, but a "court of construction must found its con-"clusions upon just reasoning, and not upon "mere speculative doubts."

In the Tagore case (reported in 4 B. L. R. 103), Phear, J., by whom the case was origi-nally heard, in addressing himself to the argument that the will was English and the testator a Bengali, said: "It is manifest "that the testator has of design used English "legal phraseology, and I think, in construing "this will, I must assume he understood its "technical force." Then His Lordship goes on to consider the question whether there was an estate tail, and he says: "It is a maxim in "England relative to the construction of wills "that the Court ought to gather the intention "of the testator from that which the will, "expressly or by implication, declares, and "should be astute to give practical effect to "the intention if it legally can, and I "think the same rule should hold here. "The assumption that the testator knew "the peculiar meaning of the words which "he used is a valuable guide to ascertaining "what he intended to express. But, having "arrived at what he intended to express, I "must give it the effect which is properly due "to it in this Court, and not the effect which "it might have in the understanding of the "Courts at Westminster."

With reference to that observation, Sir Barnes Peacock says: "But it is not be-"cause the Court cannot legally give effect to "the real and actual intentions of the testator, "that they would be justified in so constru-"ing the will as to declare that the testator "intended to create estates which it is clear "he never intended to create. If the devises "which he did intend are contrary to law, "and such as he had no legal power to make, "they ought to be rejected as void, and not "be converted by the Court into devises "creating larger estates than the testator "intended." His Lordship goes on to say: "I quite agree that the Court ought to gather "the intention of the testator from that which "the will expressly or by implication declares. "The rule is just as applicable to the wills "of Hindoos as to those of persons of other "religions. This case depends upon the will "of a Hindoo, and affects the right of "inheritance to the estate of a Hindoo. It "must, therefore, be determined according to "Hindoo law (21 Geo. III., c. 70, s. 17). The "fact of the plaintiff's having renounced his "religion does not in any way impair or "affect his right of inheritance (Act XXI. "of 1850). It is hardly necessary to cite "texts to prove that, according to the Hindoo "law, the will of the donor is the cause of "property. But if authorities were wanting, "they may be found in the Dayabhaga, c. IV. "s. 1, vv. 16 and 17; see also Vyavastha "Darpana, pp. 606, 794." Then His Lordship refers to the case of Soorjee Monee Dossee v. Denobundoo Mullick (4 W. R., P.C., 114*) and to Bhoobun Moyee Dabea *vs.* Ramkishore Acharjee (3 W. R., P. C., 15†).

Macpherson, J., has in his judgment referred to two cases as being in support of the view which he took. It is not very difficult to show your Lordships that they do not give that support which the learned Judge thought they might give. The first is the unreported case of Roop Lal Khettry *vs.* Mohima Churn Roy. But there the language of the will was very different.

As to the case reported in 13 Moore's I. A. 209,‡ there is not the slightest authority for the proposition laid down by His Lordship; for it was held that there was no ground whatever in the document in that case for assuming that the ladies described as "wise and intelligent" took any absolute interest in the property of their husband; and then if we look to circumstances extrinsic to the will itself, we find the lady dealing with the property as her right. [*Couch, C.J.*—The extrinsic circumstance must not be subsequent to the will, but an extrinsic circumstance at the time the will was made to show what the intention of the testator was.]

There was an earlier will dated 1781 set out at p. 69 of Montriou's Hindoo Wills: "I, Sree Juggulkishore Addie execute the following will: I, of my own free will, make

* Suth. P. C. Cases 291.
† *Idem* 574.
‡ 13 W. R., P. C., 47.

wife Sreemutty Kishoree Dossee and my Nundoo Lall Addie joint executors to my te. I make them masters of my estate, cts, &c. Should there be any other will anybody else's name, I hereby make it l." There was a question raised as to ther or not the widow took a life-estate he moiety of the property bequeathed to , and it was held that she took a life-te only. Sir Francis Macnaghten in his onsiderations" dissented from the conclu- that the widow took a life-estate only; no case can be cited to show that that ion by which the widow was held to a life-estate only has ever been followed. hen comes the question, supposing that case was one of the gift to the wife, did it ate so as to vest the property in her as dhun; and, if so, as to confer on her an olute interest in the property. The ques- is put shortly by Macnaghten in his ciples, vol. I., p. 40, as follows:—

The Hindoo law recognizes the absolute inion of a married woman over her rate and peculiar property, except land n to her by her husband, of which she at liberty to make any disposition at sure." The question is whether that tion arises under the terms of this will.

n the Dayabhaga, c. IV., s. 1, the author s with the question of stridhun. verse 10 there is a limit fixed to what shall be stridhun given by husband; and verses 8 and 9 expressly l with the case of donations made ing the husband's lifetime. Your Lord- s are aware that, under the Bengal , when the widow takes the estate of husband at his death as his heir, it does come to her as stridhun, but as one of heirs of her husband, and the subsequent rse of descent is to be taken from the band, and not the wife. The husband's ations are referred to afterwards, and are te inconsistent with testamentary gifts. y can only be given by an act *inter* . So in the Dayakrama Sangraha , s. 4, v. 2 (pp. 495 and 496 of Stokes's tion) and v. 6. Shamachurn's Vyavas- Darpana, p. 733, gives a table of the rse of descent to stridhun. If my client's ther had been dead at the time when the low died, Mr. Kennedy's client would e had the property from my client; but she alive, and she had a prior right, and, ing that prior right, the course of descent st be traced from her, and her son is tled to take it. See 1 Macnaghten, 38.

Section 2 of the Limitation Act (XIV. of 1859) says that "No suit against a trustee in his lifetime shall be bound by any length of time." Were it not for that section and for the assumption that that section applies to a case like the present, the plaintiff's suit would be barred, because the cause of action occurred to his father in his lifetime, being a person *sui juris*, and living seven years afterwards. The language of the section itself seems to point out most distinctly that it applied to the case of express trusts only, and it was in fact intended to be tantamount to the 3 & 4 Wm. IV., c. 27, s. 25. In that Act the words "express trusts" are used. The question has from time to time arisen, but I do not think it has been decided. In Mr. Ninian Thomson's Work (2nd Ed., p. 233) we read: "The Indian Law Com- "missioners thus define the term 'trustees' as "employed in the corresponding section of "the Draft Limitation Act: By the term "*trustees*, we mean what is popularly, and, "in general, technically understood by it, "*viz.*, persons to whom property is conveyed "in trust for specific purposes, by wills, "settlements, and other formal deeds." [*Couch, C.J.*—You cannot interpret Acts by reports of Commissioners.] In Ooma Soonduree Dossee *vs.* Dwarkanath Roy, 2 B. L. R., App. Civil, 284,* the question that arose was whether or not a benameedar who had property in his own name could be held a trustee within the meaning of this clause. The late Chief Justice at p. 290 says:—

"The Judge says: 'With regard to the "question of limitation, the Court has found "that the relation of trustee and *cestuique* "*trust* existed between the parties up to the "institution of this suit. The possession of "the defendants must be regarded, therefore, "as the possession of themselves and their "brothers; and their possession, not being "adverse to the plaintiff, cannot be pleaded "as a ground of limitation in bar of the "suit. Of the doubt existing as to the "origin and execution of the trust, lapse of "time will not enable those who were trustees "to appropriate to themselves that which is "the property of others.' I do not think that "the relationship of trustee and *cestuique* "*trust* existed between the parties." Sir Barnes Peacock then went on to say that that was a suit clearly within the meaning of cl. 13, s. 1, Act XIV. of 1859, and after referring

* 11 W. R. 72.

to section 2, he said: "The Judge has, it "would seem, treated a *benamee* transaction "as creating the relationship of trustee "and *cestuique trust* between the bena-"meedar and the real principals. But there "can be no greater reason for holding "that no length of time is a bar to a "suit to recover property on the ground "that it is joint-family property, when the "property is purchased benamee in the name "of one member of the family, than there "is for holding that it would be so barred, "if the property stood openly and honestly "in the names of all the members," and His Lordship added: "It would be dan-"gerous to hold that a benameedar is a "trustee for the real owner within the mean-"ing of section 2."

In 9 Weekly Reporter 187, it was held by a Full Bench that a mortgagee, after the mortgage had been satisfied, was not a trustee for the mortgagor within the meaning of section 2, Act XIV. of 1859. There are many cases in England where the question was raised, and there is reason for saying that the authorities applicable to express trusts do not apply to implied trusts. There is the section in the 3 and 4 Wm. IV. to which I have already referred. Then in Clegg *vs.* Edmondson, 3 Jurist, N. S., p. 303, Lord Justice Turner said: "We have to deal in this case not with a direct but a constructive trust; not with property subject merely to the ordinary contingencies by which all property is affected and maintained at a moderate and scarcely varying expense, but with missing property, which is subject to extraordinary contingencies, and which can be rendered productive only by a large and uncertain outlay. The authorities, I think, fully warrant us in saying that the rules which govern cases of direct trust and apply to property of an ordinary character, are not equally applicable to cases of constructive trust, and to property of the description which we have here to deal with."

See also Petre *vs.* Petre (1 Drewry 371), where all the cases on the subject are summed up.

The question is one of considerable importance. Mr. Ninian Thomson, referring to many other cases, says: "It has been held "that the *maujjul*, or exigible dower of a "Mahomedan woman in the hands of her "husband, is to be considered as her estate "held by him in trust for her (Oomdah "Begum *vs.* Mahomed Faez, 6 W. R. 111). "It would be more correct to say that the "possession by a Mahomedan of his wife's "property during the continuance of the mar-"riage is the possession of the wife. and "does not become an adverse possession until "the marriage is dissolved."

Then, on reference to the case in the 9th W. R. 187, to which I have referred, he says that in the 10th W. R. 174, in a case in which the plaintiff sued to recover a balance of money advanced from time to time to the defendant for the purpose of erecting buildings, &c., the defendant pleaded limitation by reason that the money had been advanced more than three years before the date of suit and it was held that the matter partook of the nature of a trust to which no limitation would apply. "But" (adds Mr. Thomson) "it is plain that this case was the ordinary "case of principal and agent, and should have "been disposed of under cl. 16 of s. 1."

Upon the true construction of the Limitation Act, therefore, I contend that if the trusts under this will are implied trusts, the suit is not saved from the operation of the Law of Limitation by section 2.

As regards the question of costs, my client contends that the Court below ought not to have awarded costs. He was sued as an executor, and charges were made against him of waste, misappropriation, and improper dealing with the estate. The question ultimately turned upon the construction of a will upon a case not put forward by the respondents until they came into Court, and my learned friend opposite ingeniously put forward a case which was not raised and not so much as hinted at in the pleadings.

Mr. Kennedy (for respondent).—There are questions of singular difficulty which arise in this case besides those decided by Macpherson, J. The nature of the case is that the testator was a Hindoo, was unacquainted with English, at any rate his name is signed in Bengalee, and the signature is that of a very illiterate person. This is one of those cases which illustrate the singular difficulty in which this Court and the Supreme Court became involved, by what seems to me to have been a misunderstanding of the previous state of the Hindoo law, and by the introduction of a testamentary capacity which does not seem to have been prohibited or limited by the Hindoo texts. In Kumara Asima Krishna Deb *vs.* Kumara Kumara Krishna Deb (2 B. L. R., O. J.), Markby, J., took a view of testamentary capacity and testamentary power different from that which had before been taken. It was held formerly that the testamentary power was simply an extension of the power of gift. His Lordship was inclined to differ from that view. He did not

ree that gifts *inter vivos* and gifts by will re analogous in their nature. [*Couch, C.J.* -The testamentary power being one that been clearly established, there is no use considering how it arose.] I refer to it cause my learned friend opposite said that re was no text which laid down that a acy was stridhun. Now, the texts could dly be expected to apply to a subject which er came within the contemplation of Hindoo sages. I was rather anxious this case should be postponed until we w the fate of the Tagore case, as the gment of the Privy Council will probably w some light on this case.

ut taking the present will as that of a doo, my learned friend says there is no e in which a legacy was treated as stri- n. In 2 Morley's Digest (East's Notes of cided Cases), case No. 45, p. 65, the ques- n put by the Court to the Pundits was: a legacy be given to a married woman, her husband any interest in it?" The y was: "If the legacy be given to her by relations of her husband, or by her own tions, it is stridhun, and the husband no right to it; but if given to her by a nger, she cannot part with her interest in ithout her husband's consent." In truth ke it that in the accurate use of the word dhun, immovable property given by the band to the wife after marriage is not ally stridhun. It is property of a very uliar character; but as far as the autho- es go, they sufficiently show that immove- property given by the husband to the wife marriage does not vest in her absolutely. the note to the very last section of ebrooke's Digest, Book V., c. 9, s. 2, art. , it is said: "Such is the inheritance eparate wealth left by a married woman; ever land given by her husband does not olve on the heirs of her separate pro- y, but on those of her husband's." re is a case reported in 2 Macnaghten's ciples 215, where it was held that per- al property given by a husband to his on the occasion of contracting a second riage, was hers absolutely; not so real perty over which the husband's right ures, notwithstanding the gift. I shall w that there was a great distinction between movable property given to a wife and other perty. In the case just cited it will be n that the sons consented. [*Markby, J.*— s that after it was decided that a father ld disinherit his son?] I cannot say. e date of the decision is not given. But o not think there can be much doubt in Lower Bengal under the Bengal School of Law, the Dayabhaga, as to the power of a father to disinherit his son. With reference to the other view of the case, one is bound in dealing with the will of a Hindoo to construe it according to Hindoo law and according to Hindoo thought. In doing so, one has a strong guide in the observations of the Privy Council in the case of Gossain *vs.* Gossain (6 Moore's I. A. 76—79). And if we look at the kobala, the word *attorney-nama* is used there as a description of executor. The word executor has generally been considered as attorney. The language of the will, on the other hand, was not such as to call the attention of the testator to the fact that he was by his will disinheriting his son. The doctrine is said to have sprung from the Roman doctrine that to disinherit a son you must use express words of disinherison. At the same time, the passing-over of the son was thought to be rather a proof of the mental incapacity of the testator; that in fact he could not do it without committing a very grievous sin and violating the Hindoo moral law. It is difficult to say that the testator did wilfully intend to disinherit his infant son, and thus commit a moral sin without leaving the persons who could not perform the *shradh* by which his future peace and happiness could be secured. In the Tagore case the testator expressly named the son and assigned a reason for not making any further gift to him; and in every case there is always something to show the intention of the testator, and where a son has been excluded there is express mention of him and an express declaration of his disinherison. But when you come to the conclusion that the intention was to disinherit, then the omission of any such clause seems to me a matter of extreme suspicion. In the case of Kishoree Dossee, in Montriou's Hindoo Wills, to which the Court was referred by my learned friend, and on which some observations were made by Sir Francis Macnaghten, it appears that the attention of the Court was called to the power of a testator. The Dayabhaga, c. IV., s. 1, v. 21., contains Catyayana's definition of the gift of affectionate kindred to a woman; and v. 22 gives an explanation of the text. But v. 23 goes on to say that, "in the case of immoveables bestowed on her by her husband, a woman has no power of alienation by gift or the like," although other immoveables may be aliened. The same doctrine, with respect to the want of power of a wife to dispose of immoveable property given to her

by her husband, was adopted by Loch and Seton-Karr, JJ., in 3 W. R. 49. And in Colebrooke's Digest, Book V., c. 9, s. 1, v. 477 (Stokes' Edn., p. 595), the text of Catyayana is thus given: "What a woman has received as a gift from her husband, she may dispose of at pleasure after his death, *if it be moveable.*"

In the Dayakrama Sangraha, which is of high authority in the Bengal School, c. II., s. 2, v. 24, says: "A woman's property may then be briefly defined to be that wealth which, independent of her husband's control, she has a right to dispose of at pleasure, recognized as this right is by law which Catyayana has declared;" and v. 31 says: "'Even in the case of immoveables,' relates to immoveable property other than that which has been bestowed upon her by her husband, for a prohibition exists against the gift or sale by a woman in regard to immoveable property given to her by her husband; so Nareda, 'what has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give it away, excepting immoveable property.'"

[*Couch, C.J.*—As far as we have gone at present, you are citing authorities to show that a woman cannot alienate property received from her husband if it is immoveable; and your argument is that if she cannot alienate, it must go to the heirs of the husband. Have you any text which expressly says that?] I have established that she has not the power of alienation, and I think that that in itself is a reason of such enormous weight that, if it be admitted that this property has been fixed with the quality of inalienability, it cannot be taken as stridhun to follow the ordinary line of descent. See also Colebrooke's Digest, Book V., c. 9, s. 2, art. 2, v. 551, p. 629. The same doctrine was adopted not only in the Purneah case cited from 2 Macnaghten 215, but must be taken to have been the basis of the decree passed by the Supreme Court in the case of Doyal Chund Addie. My learned friend has contended that the character of descent from stridhun only vests on the first occasion. He is right in that, but he is wrong in his contention that the daughter is the *proposita* or the first person who takes under that descent from stridhun, because that very case shows that the daughter is not the *proposita*, and that she was not a full heir. A female heir is never a full heir. At least under the Bengal School she never takes an absolute interest; and after the first descent the property ceases to have the character of stridhun and devolves on the heir of the original decree. The descent would be traced, not from the daughter, but from the mother again, according to the ordinary law of inheritance. As to the case reported in 1 Select Reports 3, there seems to have been a mistake in the marginal note, because the decision is exactly the reverse of the marginal note. [*Couch, C.J.*—This case seems against you rather than for you. It is a case of immoveable property which passed to the woman's daughter.] The peculiarity of this case is that it is immoveable property given by the husband. [*Mr. Branson.*—That is the case of a childless widow.] See also Shamachurn's Vyavastha Darpana, pp. 730, 731, v. 487.

With regard to the question of limitation in this country the language of the Statute is not so strong and not so pointed as in England, and I shall show your Lordships that it has been held that the doctrine is not so narrow on the question of implied trusts and that the Courts at home have given a very considerable amount of latitude with regard to the construction of express trusts. [*Couch, C.J.*—Do you say that the Indian Act extends to implied trusts?] With regard to the English cases I would cite Harris *vs.* Harris (29 Beavan 110); Knight *vs.* Bowyer (23 Beavan 609); and Mathew *vs.* Brise (11 Beavan 345), to show that where there is a fiduciary relation, the statute of limitation does not apply. [*Couch, C.J.*—If so, the enactment in favor of express trusts was not necessary.] As to the Indian Act, Mr. Ninian Thomson's note to section 2, gives the case of Bacharam Chowdhry *vs.* Mahtab Beebee (Gap No. W. R. 377), where it was held that limitation could not apply, because while the property was in the hands of the brother, it was in the hands of a trustee.

Mr. Ghose (on the same side).—Under the Hindoo law a gift by a husband to the wife, whether *inter vivos* or testamentary, is inalienable by the wife of the donor, and goes to the heirs of the husband, and not to the class who take stridhun absolutely. The word stridhun is somewhat loosely employed in this case, and a great deal of confusion has arisen from not keeping a clear and manifest distinction in mind. There are two kinds of stridhun under the Hindoo law. According to Shamachurn, stridhun is absolute and not absolute. While, on the one hand, stridhun absolute or the property peculiar to women comes under Chapter V. of the Dayabhaga; on the other hand, there is

idhun which must go to the husband's irs and follows the ordinary rules of ccession.

[*Couch, C. J.*—It may be that she cannot enate it, but it does not follow that it goes the husband's heirs. There is an autho- in Macnaghten in direct conflict to that. ound it after Mr. Kennedy had closed his e.]

I shall show my authorities, and my con- ion will be that, if she cannot alienate it, will not constitute her *peculium*. *uch, C.J.*—The question here is whether oes to her heirs or the husband's heirs.] order to answer that, it will be necessary see whether it constitutes her stridhun olute or not, because, if it does not, it will to the husband's heirs. A careful exa- ation of Chapter IV. will show the value this distinction as a test or criterion by ich to decide whether this property is idhun or not. For this purpose we are to have recourse to any arguments, but see what is the test laid down in the Daya- ga. That test will be found in Chapter , section 1, verse 118. If it can be estab- ed that this is property which she has no er to sell independently of her husband's trol, it follows that it does not constitute stridhun absolute. [*Couch, C.J.*—The point in the case is whether it goes to heirs or to her husband's.] If it is not idhun absolute, it cannot go to any one the heirs of the husband. Some doubt been thrown on the other side as to the e of the text of Nareda; but that is the doo law all over India. This text is down in Shamachurn's Vyavastha Dar- a, p. 685, v. 428, where it is said: "That e is her peculiar property which she has er to give, sell, or use, independently of husband's control." But even, if I do not w that this is stridhun absolute, it will for the other side to show that it follows ordinary rules of succession. To show this is not stridhun absolute, see Shama- rn, p. 686, v. 429, which says: "The eable property given by a husband does become absolute stridhun only so long as lives; but the immoveable property given him does not become so even after his th. If it be conceded that the immove- e property does not become stridhun even r the death of the husband, then, by the t of this distinction, the authorities which all cite will appear very clear. See verse , which contains the distinction adverted by the Pundits in the Purneah case red to by Mr. Kennedy. In that case the question was to whom the property was to go, and the same distinction was observed. The case is reported in 2 Macnaghten's Principles 215, and also in Shamachurn 697. Then I have in my favor the decision of Chief Justice East in Cossinauth Bysack *vs.* Hurrosoondary Dossee (2 Morley's Digest 198). In that case the Chief Justice, after taking the opinion of the Pundits, gave an elaborate judgment, and at p. 207 will be found the following passage: "The most material passages of the Dayabhaga are to be found in the 4th and 11th chapters, but principally in the last. The 4th treats of the succession to a woman's property, which, for this purpose, is divisible into property given to her in the lifetime of her husband, and property of her husband devolving to her upon his death. The former is considered as her own peculiar property or stridhun, which, in general, she may dispose of as she pleases, except immoveable property given her by her husband, in which she has only a life-interest, and upon her death it descends to his heirs, and not to her own parental heirs; and except immoveable property given to her by her own parents in her maiden state, which always goes to her brother if she die without issue." She only had a life-interest, and, after her death, it would go, not to her heirs, but to her husband's heirs. Then, as to the case of Dyal Chand Addie, I find that Sir Francis Macnaghten has fallen into an error. I have the original report which shows that a great deal more transpired than appears from Mr. Montriou's report. I find that there was a grandson living as well as the daughter. Then, again, the opinion of two dissentient Bengal Pundits is given in Montriou's Hindoo Wills; but I find from the MS. notes of the Judges that the Court, finding their opinion somewhat conflicting with the authorities, proposed some further questions, and asked the Pundits to reconsider their previous opinion, and, after reconsidering the question, were of opinion that the widow took such an interest under the will as would enable her to give away any part she pleased of the moveable property to strangers to her husband's blood, or to whomsoever she pleased, whilst the grandson of her husband was living.

The case to which your Lordship the Chief Justice has referred me is the Tirhoot case. [*Couch, C.J.*—That was not under the Bengal law.] No, it is a Mitakshara case. Even if it were so, I shall show that the opinion is not accurate. [*Couch, C.J.*—Is there any differ-

ence in this respect between the Mitakshara and the Dayabhaga? It is very doubtful whether the Purneah case is a Mitakshara or Bengal case. We have made some enquiries, and it certainly is not altogether a Bengal District. A portion of it is in Bengal. But probably there is no difference in this respect between the two Schools of Law.] There is no difference certainly as to alienability. As to other points, I can find no authority. [*Couch, C.J.*—That is quoted in a work that is law as current in Bengal. I mean Macnaghten's Hindoo Law.] All that I can say is that there are two authorities in conflict with each other in the same book. In the one case, the Pundits make a distinction between property given by the husband upon second marriage to please his former wife, and other property, and that is specifically mentioned in a verse of the Dayabhaga. The texts do not make any difference. But, if the distinction I am endeavouring to draw is once established, then this authority will be proved not to be correct law. [*Couch, C.J.*—If the texts make no difference in this respect, the authorities on the Mitakshara will be applicable to the present case, unless you can show any difference.] I contend that even if the opinion in that case be construed to be against me, there are other cases in my favor. First of all, there is the opinion of Chief Justice Hyde East in 2 Morley, that the property will go to the husband's heirs. That decision has been upheld in the Privy Council where it was distinctly held that the property will go to his heirs; and although there was at first a difference of opinion on the part of two Bengal Pundits, they subsequently agreed.

But, even if there should be a total absence of authority either way, I contend that, according to the Dayabhaga, c. IV., a woman can do what she pleases with all kinds of property given by the husband which are specially mentioned, but that she cannot do what she likes with immoveable property given by her husband. That can only be done by bringing the case under gifts subsequent. Now, every gift subsequent is not necessarily her stridhun or her *peculium*; and, according to the text laid down in v. 18, this is property which is said by Baboo Shamachurn not to be stridhun absolute. If, then, this property is not stridhun absolute, it must go to an exceptional class of heirs. In the view I take I am borne out by verses 19, 20, 21, c. IV., s. 1. Then follows verse 23, and then the verse of Nareda; and although there is a note which Mr. Branson said was not to be found in Nareda, it is to be found in the texts of Hindoo law.

In this case we find the words are: "I gi devise, and bequeath unto my wife and heirs and assigns for ever." In constru the object of the testator in making devise, the question is who, under the Hin law, will be the heir of this prope According to Hindoo law, it would be own sons, and it is quite clear that the m himself intended to devise according to Hindoo law. He knew he was leaving sons, one five and the other three years He could have no reason for taking away property from these two sons. Although looking at the circumstances of the case, cannot look at subsequent circumstances, should look at surrounding circumstan and following the decision laid down the 14 W. R. 316, we are bound to l to the fact that the man made his wil his last moments; that the will is dr up by an English attorney, and that th is nothing to show that it was read out explained to him; and that the instructi for the will were given at the time he dying and were very imperfectly carried [*Markby, J.*—What is your authority saying so? That is purely a surmi It is so alleged in the plaint. [*Mr. Bran* —Not so.] At any rate, the will has even been engrossed. [*Couch, C.J.*— will was not drawn adopting the langua an English will.] [*Markby, J.*—At the t when the testator died, she would h been the heir without the will. She wo be the heir or malik.] [*Couch, C.J.*— son had died.] Although the words that document were held to be a te mentary instrument, yet she did not take solutely. [*Markby, J.*—The word "assig was the very English word to denote co ing to her. It was used in the very to show the distinction between absol stridhun and other stridhun.] It see to me more than probable that that wo was used in a very careless way. The gore case has no bearing on the case. Hindoo widows are only entitled for pi uses and for maintenance. [*Markby, J.* Could the widow perform the funeral ce monies? Who would perform them dur her life?] The widow would provide means, but the sons would perform ceremonies. Mr. Branson has shown me affidavit from which it appears that the was explained to the testator, and that died on the day after. Even, if that is so does not affect the force of my other ar

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ents. It is quite possible that, when the ll was explained to him, he thought that wishes were complied with, and that his would take after his wife. [*Couch, C.J.* f this will had been properly explained im (as we must assume it was, unless you w the contrary), he must have been told whom the property would go.]

Mr. Branson (*in reply*).—In the case in W. R. to which Mr. Ghose referred, I that the document which your Lordship, Chief Justice, and Mitter, J., treated as a mentary disposition, contained these ds: "Further, as of Ranee Dhun Kooer e are two daughters, who, after marriage, the blessings of Providence, may be sed with children, *they and their dren*, therefore, *are and will be the rs and maliks;*" and your Lordships say: Considering, then, the state of his family that he was a Hindoo, and taking the re instrument and construing its parts reference to each other, I think it was intention of Roy Hur Narain that the te should be kept in his own family, and the daughters and their children, as well Ranee Dhun Kooer, should succeed to his perty, and this may be effectuated by wing them to take after Dhun Kooer." en there was a distinct gift to her, but t has no bearing on a will so technically wn as this. [*Couch, C.J.*—The question ly comes to this, whether, if a Hindoo oses to make a will according to the glish law, it should not be construed rding to the rules of English law.] I eve the late Chief Justice in the Tagore said that it was not the duty of the Court make a will, but to construe the words. en as to the case in 2 Morley's Digest 207, e in the Bar Library copy of that work ncil note opposite to the part where it that immoveable property descends to husband's heirs, drawing attention to the of G. *vs.* K., *post* 234, and your Lordps will there find an opinion opposite to Mr. Kennedy said that it was hard to ceive how a Hindoo woman could take perty which is not treatable as stridhun. does it seem to me; but where a Hindoo Lower Bengal has an absolute power to e any disposition, and he, as in this case, es an absolute gift to his wife, he takes it of the stridhun, and she has absolute er to dispose of it as she likes. If it is dhun, the authorities are clear. See Dayama Sangraha, c. II, s. 4, verses 2 and 5. the same effect is the text in the Dayama, c. IV., s. 2, v. 9, in connection with, which must be read the preceding verses 1 to 8, and verses 10 and 11. Therefore, if this property is not stridhun, but is property given by the will of the husband absolutely to the wife, her heirs, and assigns, she had a right to alienate it; or if she had no right to alienate it, it came to the daughter who was alive; in whichever way the matter is looked at, there can be no doubt as to who is entitled to the property. As to stridhun losing its character of stridhun, I would refer to the case in 10 W. R. 488, in which the Court said at p. 490: "We are of opinion that, as a "betrothed daughter, the plaintiff was not, at "the time of her mother's death, entitled to "any share in her mother's stridhun. An "attempt has been made to show that, even "if the maiden daughter inherited, the plaint-"iff is entitled to inherit on the death of the "maiden daughter; but the Hindoo law on "this point is undoubted, namely, that when "stridhun has once devolved as stridhun "upon an heir, it does not continue to "devolve as stridhun, but afterwards de-"volves according to the ordinary rules of "Hindoo law."

This property having devolved on our mother, it would devolve from our mother to us. With reference to the case in 1 Select Reports, it has been explained that in that case the property went to the brother of the lady, because she was a childless widow. In 1 Cowell on Hindoo Law 219, 220, both this case and the other in 10 W. R. are considered.

The Court took time to consider their judgment, which was delivered as follows on the 3rd January 1873 by—

Couch, C.J.—The plaintiff and the defendant in this suit, which comes before us on appeal from the decision of Mr. Justice Macpherson, are the grandsons of Hurronundo Sircar, the plaintiff being the son of a son, and the defendant of a daughter. Hurronundo Sircar died in 1833, leaving a widow Luckeymoney Dossee, and two sons Shamachurn and Woomachurn and a daughter Roymoney. Shamachurn died in 1849 without issue, leaving a widow, who died in 1855 or 1856. Woomachurn died in 1854, leaving one son, the plaintiff. Roymoney is still living, and the defendant is her son. Hurronundo Sircar made a will in English which was apparently prepared by an English attorney, but is signed by the testator himself in Bengali. It consists of only a few lines, and the following is the material part of it: "I give, devise, and bequeath unto my wife,

Sreemutty Luckeymoney Dossee, and her heirs and assigns for ever, all my real and personal estates and effects, and do appoint my said wife sole executrix of this my will." Luckeymoney Dossee, after the death of her husband, obtained probate of this will in the late Supreme Court; and by the practice of the Court it was necessary, before probate would be granted, to file an affidavit that the will had been explained to the testator. Luckeymoney Dossee possessed herself of all the estate and effects of her deceased husband; but her sons, Shamachurn and Woomachurn, who were young children at the time of the death of their father, always lived with her, and substantially had the enjoyment of the property along with her; and on the evidence of the defendant Prosono Coomar himself, it appears that Shamachurn and Woomachurn, after they attained to years of discretion, used to assist her in the management of the property, although everything was done in her name. Luckeymoney, on one or two occasions, sold portions of the property which belonged to Hurronundo's estate; and on these occasions conveyances were made by her. One of them, dated the 3rd of February 1849, has been put in, and in that she states that she sells the property, her husband having given a *turneenama* ("will") in her name. Whilst this bill of sale was given by Luckeymoney as being the person having the right to convey, both Shamachurn and Woomachurn, who were the heirs of Hurronundo Sircar, signed the conveyance as witnesses. This Mr. Justice Macpherson says is a proceeding well understood among natives as indicating that the sons, being parties having an interest, gave their consent to the sale being made; but in the case he refers to in another part of his judgment, reported in 13 Moore's I. A. 209, the Judicial Committee say they cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence.

Shamachurn's widow, Rampreosi, having died, Luckeymoney very shortly afterwards executed a deed of gift to the defendant Prosono Coomar Ghose of the property which is the subject of this suit. That deed is dated the 18th of October 1856, and in it the property is described as being property "which was given (to me) and has been held and enjoyed by me up to this time."

Two or three months before her death, Luckeymoney Dossee made a will in which she says: "My late husband Hurronundo Sircar having made a will on the 22nd day of September of the English year 1833, granted all his moveable and immoveable property to me. Thereafter, upon his death, I, having obtained the whole of his property by virtue of his will, am possessing and enjoying the same from that time up to the present as owner of the right of the gift (and sale thereof), and I have alienated some of those properties." Then she says that she has already given, out of the properties granted by her husband, a six-anna share of the family house to the defendant Prosono Coomar Ghose by deed of gift, and she goes on to bequeath the remaining immoveable properties which she then had and her entire moveable property to her son's son, Tarucknath Sircar. She then proceeds to appoint the defendant Prosono Coomar Ghose executor and manager during his minority, and to declare that the whole estate should go to Prosono Coomar Ghose absolutely in the event of Tarucknath Sircar dying a minor without issue, or of his renouncing the Hindoo religion.

The suit is brought by Tarucknath Sircar who claims the whole of the property, and he asked that it might be declared that under and by virtue of the will of Hurronundo Sircar, Luckeymoney Dossee had no power to devise the property included therein. Mr. Justice Macpherson made a decree in the plaintiff's favor, holding that the will of Hurronundo Sircar must be read as merely making over the property to the wife to be held by her in trust for the infant heir. He says in his judgment, there is no doubt that the question which has been raised is one of great importance to Hindoos, as bearing upon the question of the principles upon which the Courts ought to act in construing wills made by Hindoos. I quite agree to this; but it appears to me that the principles upon which the Courts ought to act have been authoritatively determined, and in the present case we have only to apply them. In Sreemutty Soorjeemoney Dossee *vs.* Denobundoo Mullick, 6 Moore's I. A. 526,* the Judicial Committee (p. 550) say: "The Hindoo Law, no less than the English Law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of

* 4 W. R., P. C., 114.

e testator's wishes; but the meaning to be ached to them may be affected by surround- g circumstances, and where this is the case, se circumstances no doubt must be regard- Amongst the circumstances thus to be arded is the law of the country under ich the will is made, and its dispositions to be carried out. If that law has at- hed to particular words a particular mean- , or to a particular disposition a particular ct, it must be assumed that the testator, in disposition which he has made, had regard that meaning, or to that effect, unless the guage of the will or the surrounding umstances displace that assumption. ese are, as we think, the principles by ich we ought to be guided in determining case before us; and we must first, there- e, consider what was the intention of the tator to be collected from the words of will."

Although the will was signed by the tator in Bengali, I think it must now be sumed that it was explained to him, and t he understood its meaning. If it was , and he did not understand what he was ning, there would be no question of con- uction, for it would not be his will. Pro- te of it was granted by the Supreme Court, d its validity has never been questioned. r. Justice Macpherson says he has no doubt whole family thought that Luckeymoney s absolute owner of the property, and had right to dispose of it at pleasure. It pears to me that the words of this will equivocally show that it was the testator's ention that his wife should become the solute owner of all his property. That is meaning which the law has attached to words he has used, and there is nothing the language of the will to displace the sumption that he had regard to it; for the pointment of his wife as sole executrix is de with the view to complete the gift and able her to obtain probate.

The surrounding circumstances are as r. Justice Macpherson says, that the testator s a Hindoo, and that he had at the time o infant sons, and there was no reason why should desire to disinherit them. We nnot tell what reason he had for making a ill, but the fact of his doing so shows, in y opinion, that he intended his wife to be mething more than a trustee and manager the infant heirs, as she would have been ch if he had not made a will. It is not be assumed that he made this will with- t reason, and if he, a Hindoo, thought it ht to make a will, it may well be that he thought he might leave to his wife to make a proper disposition of his property amongst his family. The learned Judge has declared her to be a trustee when the will contains no words whatever to create a trust. It is not, in my opinion, necessary that there should be an express declaration of his desire, or intention to disinherit his sons, if there is an actual gift to some other person expressed in clear and unequivocal words, and I most respectfully dissent from the *dictum* of Mr. Justice Phear in the unreported case referred to; nor can I agree with Mr. Justice Macpherson in thinking that there is no indication of a desire to disinherit his sons. Allowing that a Hindoo is less likely than any other person to disinherit his sons, it still appears to me that his desire and intention to do so may be shown, as in the case of another person, by the disposition he makes of his property.

Upon the construction which, I think, I must put upon this will, the point taken by the Counsel for the respondent, the plaintiff, that the property, being the gift of a husband to his wife, was inalienable, and on her death would descend to the heirs of the husband, does not arise. The husband has given to his wife an absolute power of disposing of the property, which she has exercised. This was not an ordinary gift by the husband to his wife, to which the authorities cited might apply.

I think, therefore, that the decree should be reversed, and the suit be dismissed with costs on scale No. 2, including the costs of, the appeal.

Markby, J., concurred.

The 4th January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Amendment of Plaint—Act VIII. (B. C.) of 1869, s. 30.

In the Matter of

Gobind Chunder Bose, *Petitioner,*

versus

Bykuntnath Ghose, *Opposite Party.*

Baboo Romesh Chunder Mitter for Petitioner.

Baboo Oopendro Chunder Bose for Opposite Party.

Where a suit has been erroneously brought under Act VIII. (B.C.) of 1869, s. 30, and plaintiff applies to have his plaint amended, the suit should not be dismissed, but some order should be passed on the application.

Kemp, J.—In this case we think that, inasmuch as the petitioner presented an application to the Court below to have the plaint amended to this extent, namely, as far as it was recited therein that the suit was brought under section 30, Act VIII. of 1869, the Court below ought to have passed some order with reference to that application instead of dismissing the plaintiff's suit, because he held that, under the provisions of section 30, Act VIII. of 1869, the plaintiff not being the employer of the gomashta, the defendant in the suit, could not bring a suit under that Act. We, therefore, direct the Moonsiff to allow the plaintiff to amend his plaint and to take up the case under the provisions of Act VIII. of 1859. We think, however, that the costs of this application must be borne by the petitioner, inasmuch as it was on account of his own erroneous application of the law that this order became necessary. The petitioner will, therefore, pay the costs of this application.

The 4th January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Execution — Obstruction to Possession — Act VIII. of 1859, ss. 226 and 230.

In the Matter of

Bibee Mahtab Koomaree, *Petitioner.*

Baboos Sreenath Doss and *Rash Beharee Ghose* for Petitioner.

A third party having petitioned the Court below, stating that she was in possession of certain property which a decree-holder had attempted to take in execution, and that the judgment-debtor had no title in it, that Court passed an order that the application must remain in the serishta as the decree-holder had given a receipt for possession:

Held that this was tantamount to no order, and that the Court could not be put in motion under section 226 of the Code of Civil Procedure without an application from the decree-holder under that section:

Held that the lower Court ought to have made some inquiry; but the High Court could not interfere as the third party had not applied under section 230.

Kemp, J.—This is an application on the part of Bibee Mahtab Koomaree. It appears that one Sharoda Pershad Mullick obtained a decree against Roy Luchmeeput Singh. The decree-holder attempted to take possession of the property decreed, and an officer of the Court was deputed who was obstructed by the petitioner. The officer reported his inability to give possession to the decree-holder. The petitioner before us appears to have presented a petition to the Court below, stating that she was in possession of the property, and that the judgment-debtor has no title whatever in the property. Upon this, the Subordinate Judge passed the following order, namely, that, inasmuch as the decree-holder had given a receipt for possession, the petitioner's application must remain in the serishta. Such an order is tantamount to no order at all. It does not appear in this case that the decree-holder has made any application to the Court under section 226, and it is only on an application from the decree-holder that the Court can be put in motion under that section. Under section 230, the petitioner, who is a third party other than the defendant in the suit, if dispossessed of any property under the decree, could have applied to the Court, and on such application being made, the Court, after examining the applicant, and ascertaining that there was probable cause for making the application, could have proceeded to investigate the matter in dispute; but no such application appears to have been made by the petitioner before us. This Court therefore cannot interfere in this matter, although we think that the Subordinate Judge ought to have made some inquiry into the case, and not to have passed an order directing the petition to be filed on the record.

The 4th January 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Adoption—Res Adjudicata—Act VIII. of 1859, s. 2.

Case No. 212 of 1871.

Regular Appeal from a decision passed by the Judge of Rajshahye, dated the 3rd August 1871.

Kristo Beharee Roy (Plaintiff), *Appellant,*

versus

Bunwaree Loll Roy and another (Defendants), *Respondents.*

r. *J. T. Woodroffe* and *Baboos Unnoda Pershad Banerjee, Rash Beharee Ghose,* and *Issur Chunder Chuckerbutty* for Appellant.

e *Advocate-General* and *Baboos Sreenath Doss* and *Bhuggobutty Churn Ghose* for Respondents.

l suit to set aside the alleged adoption of defendant, hich the adopting mother was made a party, was d to be barred by Act VIII. of 1859, s. 2, because the e issue, *i.e.*, that of the validity or otherwise of the ption, had been tried, not incidentally or collaterally, substantially, in former suits, in which the same ntiff and defendant were in direct contest, although whole of the estate to which the parties claimed to heirs was not then at stake, but only a portion reof.

Kemp, J.—THE plaintiff is the appellant. e suit is brought to set aside the alleged ption of the defendant No. 2, Bunwaree ll Roy. The adopting mother, Brojessuree owdhrain, is made a party to the suit.

The plaint recites that the late Gour Soon- r Roy died on the 5th of Falgoon 1240, ving a widow, the defendant Brojessuree owdhrain, and the plaintiff, the son of the ternal uncle of the late Gour Soondur y; that no deed of permission to adopt s executed by the late Gour Soondur Roy; t the defendant Brojessurree purchased the endant Bunwaree Loll Roy, and illegally opted him with a view to defraud the plain- f, who is the reversioner. The plaint then ceeds to state that several admissions were tracted from him (the plaintiff) by holding various pretexts and hopes, and exciting rs, which tend to support the alleged option.

The plaint is dated the 28th February 71. The plaintiff, on the 29th June 1871, d a written statement briefly to the follow- g effect: That the plaintiff, being ignorant t he was the legal heir of the late Gour ondur Roy, through solicitations, sub- ibed his name as a witness to the spurious putro or deed of gift; that, subsequently, defendant, Bunwaree Loll Roy, brought uit in the Court of the Principal Sudder een to set aside the plaintiff's putnee right Mouzah Nursingpore, and to obtain pos- on of that estate; that the defendant, waree Loll Roy, prevailed upon the ntiff, by holding out hopes and exciting s, to sign a written statement, an ekrar, a solehnama containing false statements an admission of the defendant's adoption; these statements are false and unfound- that shortly after these fraudulent pro- dings, in a suit brought by the defendant Bunwaree Loll Roy against Pearee Mohun Mullick and others to set aside a putnee, an issue was "incidentally" raised with reference to the adoption of Bunwaree Loll Roy; that the plaintiff appeared in that case under section 73, Act VIII. of 1859, and took exception to the adoption, the result of that suit being that, on special appeal, the High Court held that the admissions of the plaintiff were not prejudicial to his rights, and did not operate as an estoppel to his claim.

The defendant, Bunwaree Loll Roy, filed a written statement on the 12th of July 1871, briefly to this effect, *viz.*, that the suit of the plaintiff is barred under section 2, Act VIII. of 1859; that the suit is barred by the Statute of Limitations, inasmuch as it has not been instituted within twelve years from the date of the defendant's adoption; that the plaintiff held several very valuable mehals belonging to the estate of the defendant's father on the allegation of a putnee pottah granted to him by the defendant's grandmother, Hemlutta Chowdhrain; that on the defendant attaining majority, he brought a suit, No. 96 of 1861, in the Court of the Principal Sudder Ameen, to recover khas possession of these mehals by cancelment of the putnee. The defendant in that suit, the plaintiff in the present suit, entered into an agreement with the defendant in this suit, on the 10th Jeyt 1268, and also executed an ekrar of the same date, whereby the present plaintiff clearly admitted the genuineness and validity of the deed of permission to adopt and the deed of gift, as also that the adoption was good and valid. Further, that in his deposition the plaintiff has made the same admissions; that since the defendant has attained majority, the plaintiff has been employed in his service as a sezawal, and has treated the defendant as the adopted son of the late Gour Soondur Roy.

The Officiating Judge of Rajshahye, on the 3rd August 1871, dismissed the plaintiff's suit.

The Judge, on the issue of the twelve years' limitation, is of opinion that the plaintiff can sue at any time within twelve years after the death of Brojessuree Chowdhrain, the alleged adopting mother of Bunwaree Loll Roy. A Full Bench ruling, dated 2nd September 1869, to be found in volume XII. of the Weekly Reporter, is quoted in support of this finding.

As regards the question whether the suit is barrred under section 2, Act VIII. of 1859, the Judge finds that it is manifest that the

question of the validity of the adoption of Bunwaree Loll Roy was raised by the defendants in previous suits, numbered 118 and 119, of 1861; and that the present plaintiff came forward and contested the title of Bunwaree Loll Roy; that the validity of the adoption of the said Bunwaree Loll Roy was not incidentally raised in those suits, but was the "primary issue." The Judge then proceeds to observe that "It appears Krishna Beharee "(plaintiff in this suit), in order to test the "validity of the adoption, and probably to save "expense and delay, came forward, and at "his own request, was made a party to the suits "Nos. 118 and 119, and obtained a hearing, "but failed in his object. Clearly then, when "he came to the Court, and asked for a hear-"ing, and it was granted to him, and the issue "was one not incidentally bearing on the mat-"ter of the suit, but was the primary and the "chief issue bearing on the suit, it must be "held that the questions now raised, *viz.*, the "validity of the adoption and the binding "nature of Krishna Beharee's admissions, "were tried and determined by a competent "Court." For these reasons, which have been briefly stated, the Judge held that the plaintiff's suit was barred by section 2, Act VIII. of 1859.

On the question whether the suit was barred owing to the admissions of the plaintiff, the Judge found that, as the suit of plaintiff had not been instituted within six years from the date on which the plaintiff admits he became aware of the frauds alleged to have been practised upon him, and whereby he was induced to make those admissions, it is barred.

In appeal the following grounds are raised:—

1st.—The Judge is wrong in holding that the suit is barred under section 2, Act VIII. of 1859.

2nd.—The Judge is wrong in ruling that the limitation of six years applies to the claim.

3rd.—That the Judge is wrong in treating the alleged admissions as estoppels, and in entering at all into the adjudication of the third issue raised before him, without first deciding whether those admissions were obtained by fraud as alleged by the appellant.

After hearing the arguments of Mr. Woodroffe for the appellant, and the Advocate-General for the respondent, we entirely concur in the decision of the Judge on the 2nd issue raised before him, *viz.*, that the suit is barred under section 2, Act VIII. of 1859. On referring to the proceedings in the former suits Nos. 118 and 119, to which the plaintiff in this suit was a party, we find that the plaintiff and the defendant Bunwaree Loll Roy were in direct contest with each other, and had a full opportunity of exerting their respective rights. The subject-matter of those former suits was substantially the same, and the parties really and effectively interested were the same. The issues involved were the same in substance as in the present suit, although there may be some difference in the amount at which the present suit is laid. There can, we think, be no doubt that in the former suit, an issue was tried, not incidentally, nor collaterally, but substantially, and a competent Court decided in the presence of the present plaintiff that the defendant, Bunwaree Lall Roy, was the legally adopted son of the late Gour Soondur Roy. It may be that in the suits Nos. 118 and 119 the whole of the estate of Gour Soondur Roy was not at stake, but only a portion of it; still the fact of the validity or otherwise of the adoption of Bunwaree Lall Roy was fully tried and decided in favor of the present defendant, Bunwaree Lall Roy.

We also find that the present plaintiff when appealing specially to this Court against the former decision, seems to have treated that decision as disposing of the question of the adoption of Bunwaree Lall Roy; for amongst the grounds of special appeal is the following:—

"The decision of the learned Judge *quoad* "the adoption evinces a substantial defect of "investigation, inasmuch as your petitioner's "material witnesses, Bissessuree Chowdhrain "and others, have not been examined."

The learned Judges who tried the special appeal observed in their decision, which is dated the 1st of August 1864, that the appellant before them, plaintiff in the present suit, "was properly made a party to the "former suit *for the purpose of contesting* "*the issue raised therein concerning the* "*plaintiff's adoption.*"* The Judges further remarked that "it "was not stated, nor "was it probable, that the error committed "in not recalling certain witnesses who had "been examined be-"fore the appellant† "intervened (in order to give the appellant an "opportunity of cross-examining them) had, "in the case before them, produced error or "defect in the decision upon the merits."

* Defendant in this suit.

† Plaintiff in this suit.

We dismiss the appeal with costs of both Courts payable by the appellant.

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The 12th December 1872.

Present:

r James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

ency—Indigo—Purchase in a rising Market.

*Appeal from the High Court of Judicature at Fort William in Bengal.**

Betts and others

verus

Arbuthnot and Co.

gents buying indigo seed in a rising market under der to purchase on the most favorable terms cannot riment by sowing a sample and waiting before they hase to see whether it will germinate. They are only nd to act to the best of their judgment, and to use er care and skill as agents in purchasing what they ordered to purchase, and their action cannot be diated unless they are shown to have been guilty of igence.

THIS is a suit brought by Messrs. Arbnot and Company, who are merchants agents at Madras, against Mr. Betts and partners, who are indigo planters in gal. The suit is brought to recover the e of certain indigo seed which Messrs. uthnot and Company purchased as nts for Mr. Betts and his partners, under ructions received from them. In one of earliest letters from Messrs. Arbuthnot Company, they say: "At the request f Mr. Herklots, of Coonoor" (Mr. rklots was a friend of Mr. Betts), "we rite to inform you that indigo seed of this ear's growth is now available here, and at supplies will continue to come in for e next two or three months. The present rice is Rs. 6-4 to 6-8 per maund, but the emand is so great that we expect to see hortly a considerable rise. If you send us n order, we will endeavour to execute it the best of your interests." It appears t, at first, Mr. Herklots inquired of ssrs. Arbuthnot and Company whether they ld buy 2,000 maunds, which was a much er quantity than the defendants wanted sow in the following October. The proility is that when Mr. Betts instructed ssrs. Arbuthnot and Company to purchase, y were purchasing upon speculation, inding to pay the price of the seed out of the ney to be obtained by re-selling it. There is no doubt that the defendants were not prepared to pay for the seed, and it was unlikely that they would be buying seed in February to sow in October, when they had not the means to pay for it. Mr. Betts, by a letter of the 13th February, instructed Messrs. Arbuthnot and Company to purchase for him 1,000 maunds upon the most favorable terms. He says, "best fresh indigo seed;" but he sent them a telegram afterwards, instructing them to buy, not the "best," as requested in the letter, but "fresh, good." According to the evidence of Mr. Betts himself, what he instructed Messrs. Arbuthnot and Company to purchase was, "one thousand maunds indigo seed, fresh, good, on most favorable terms." Having received a letter of the 25th February, informing him that Messrs. Arbuthnot and Company had purchased at the rate of 10 rupees per maund, Mr. Betts writes on the 6th March the following letter: "Yesterday I despatched a telegram to you to the "effect that the seed I ordered must be fresh "and good." That "yesterday" was the 5th of March. He had received Messrs. Arbuthnot and Company's letter on the 2nd, stating that they had actually purchased. Then why should he immediately send off a telegram to say that he hoped the seed would be fresh and good? He had instructed Messrs. Arbuthnot and Company to buy fresh and good; why should he suppose that they had not bought fresh and good? And yet he thinks it necessary, on the 5th of March, to send a telegram to them to say that the seed which he ordered must be fresh and good, as he needs it for his October sowings. "And I now beg to advise "you that if the seed is not of this descrip-"tion,"—why should he suppose that it was not of that description?—"that is, *fresh*, "and such as I sent you an order for, you "must be aware that it would be ruinous "to sow it. Pray, therefore, kindly exercise "your judgment in this matter." How were they to exercise their judgment? They were instructed to purchase, and they had purchased. Mr. Betts must have supposed that they had purchased according to their instructions, and he must have known that, if they had not purchased according to their instructions or used due diligence in carrying out his order, he was not bound to take it. There was, therefore, no necessity to write that letter if the transaction really was such as Mr. Betts would have it supposed. It appears that when Mr. Betts found that the price had risen from Rs. 6-4 to Rs. 10 he was anxious to get out of his contract. It is clear that he was not able to pay. He afterwards asks

* From the judgment of Couch, C.J., and L. S. Jackand Glover, JJ., in Regular Appeal No. 51 of 1870, ided 26th July 1870.

Messrs. Schoene and Company whether they can sell the indigo for him, and when they tell him that Madras indigo is not saleable in Bengal, then, for the second time, he asks for a sample. He had originally asked for a sample; but Messrs. Arbuthnot and Company had informed him that the indigo had been sent to Messrs. Thomas and Company as his agents, and that they would give him a sample. He was satisfied with that answer, and did not ask again for a sample until he was informed by Messrs. Schoene and Company that they could not sell the indigo for him to advantage; then he asks for a sample, and a sample is given to him, and then he commences his experiments to see if the seed will germinate.

Three of the Judges of the High Court have found that Messrs. Arbuthnot and Company properly discharged their duty as agents. Messrs. Arbuthnot and Company, although they did state in their plaint that they were acting as sellers, were really only agents for Mr. Betts. Having purchased in Madras they had paid, or would have to pay, the person from whom they purchased; they were, therefore, in the nature of sellers, although they were really only *del credere* agents. It was necessary for Mr. Betts, before he could repudiate what his agents had done for him, and refuse to take the indigo and to pay for it, to show affirmatively that Messrs. Arbuthnot and Company had been guilty of negligence in executing the order which he had given them. He deals with the sample when he gets it by sowing it and testing it. Whether that test was or was not a good one it is not necessary to inquire, for Messrs. Arbuthnot and Company, when they were buying indigo seed at Madras in a rising market, under an order to purchase on the most favorable terms, could not have experimented by sowing a sample of the seed and waiting eight or ten days before they purchased to see whether it would germinate. They were only bound to act to the best of their judgment, and to use proper care and skill as agents in purchasing what they were ordered to purchase, *viz.*, good, fresh indigo seed.

Now, did Mr. Betts prove that Messrs. Arbuthnot and Company had not fairly and properly executed his order? It appears to their Lordships that there is no evidence to that effect, and they agree with the views which the learned Judges of the Court below have taken that Messrs. Arbuthnot and Company did fairly and properly execute the order. The Chief Justice says: "Looking "at the evidence, I can see no reason f "distrusting the plaintiff's case, and thinki "that they did not perform that which th "undertook to do for the defendants, nam "to purchase good, fresh seed." Mr. Jus Louis S. Jackson says: "I have no doubt "Messrs. Arbuthnot and Company, as age "of the defendant, honestly fulfilled "commission intrusted to them, and that "plaintiffs are entitled to recover the wh "of the amount they claim in this su with the exception of a small amount excess. The learned Judge of the first Co did not try the case upon the evidence. decided against the plaintiff on the gro of variance. That ground has, very prope been given up to-day, and has been admit that the Judge ought not to have dismis the plaintiff's claim upon the ground of variance. There were three Judges of High Court, and they were unanimous coming to the conclusion that Me Arbuthnot and Company did properly honestly fulfil the commission which had b intrusted to them.

Their Lordships, therefore, see no rea for interfering with the judgment of Court below, and they therefore will hu bly advise Her Majesty that the decision the High Court be affirmed with costs.

The 11th January 1873.

Present:

The Hon'ble F. A. Glover and Dwarkan Mitter, *Judges.*

Manager—Act VIII. of 1759, s. 243.

Cases No. 233 of 1872 and No. 1 of 187

Miscellaneous Appeals from orders passed the Judge of West Burdwan, dated spectively the 3rd and 27th July 1872.

Huree Sunkur Mookerjee (Judgment-debto *Appellant,*

versus

Jogendro Coomar Mookerjee (Decree-holde *Respondent.*

Baboo Nil Madhub Sen for Appellant.

Baboos Romesh Chunder Mitter, Rash Bi haree Ghose, and *Grish Chunder Gho* for Respondent.

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Where a manager had been appointed under s. 243, Procedure Code, after hearing the arguments on sides, the Judge was held not to be justified in re-ing him summarily at the request of the decree-er. His order was accordingly set aside by the High rt, as well as a subsequent order allowing sale of r properties attached, which properties were placed g with the others in the hands of the manager.

Glover, J.—THE parties to these appeals father and son. The son took out exe-ion in satisfaction of a decree against the er, and, after consideration, the Judge, un-the provisions of section 243 of the Civil cedure Code, appointed a manager to col-the rents of the lands attached for purpose of satisfying the judgment-cre-'s decree. This was on the 29th April 1.

On the 3rd July 1872, the Judge removed manager. No reasons are given in the ment, except that the order was passed the request of the decree-holder. When nager is appointed under section 243, appointment is made after hearing the ments on both sides, and the appointment generally considered one which, although e primarily in the interest of the debtor, kewise in the interest of all parties con-ed; and we think the Judge ought not ave removed the manager so summarily e did simply at the request of the decree-der. No reasons have been assigned so doing, and we have no means of wing why the appointment made in 1871 quashed in 1872. We also find, on ing to the record of the other appeal, on the same day that the manager was oved, the son took out execution and ched other properties belonging to his er, and had a proclamation for sale subse-ntly issued.

ow, if the first order of the Judge was ng, as we think it was, and if he was not fied in removing the manager without ing the objections which the debtor had ake, it would follow that the second or-allowing immediate execution with re-d to the other properties is wrong also, is to say, if the order passed by the ge in the first instance appointing the nager was passed after hearing both sides, is, therefore, to be considered as having n properly made, the second order remov-the manager, and the still subsequent r allowing sale of the other properties ched, which was passed without hearing objections of the other side, must be con-red to be improper.

After hearing the pleaders on both sides, and considering the relation between the parties and the circumstances arising in the case, we think that the order originally passed by the Judge appointing the manager should be upheld, and the latter order removing him without assigning any reason should be set aside; and this being so, it follows that the subsequent order allowing sale of the other properties since attached must also be set aside. The result of our order is that the properties originally placed under the manager, as well as those subsequently attached, should both remain under the manager appointed under section 243, and from the proceeds of those properties the judgment-creditor will be entitled to have his decree satisfied. This order will not prevent the Judge from hereafter removing the manager now appointed, should he show sufficient reasons for the removal.

Under the circumstances of the case, we make no order as to costs.

Mitter, J.—I concur in holding that the Judge was wrong in removing the manager, merely because the judgment-creditor, without showing any reason whatever, came forward and asked him to do so; and I think that, under the circumstances of the case, it is just and equitable that we should, under the discretion vested in us by section 243, order that the properties subsequently attached should not be sold immediately, but that they should be placed along with the other properties in the hands of the manager.

The 14th January 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Charles Pontifex, *Judge*.

Bank—Bank Manager—Private Agent—Bona fides.

On Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

F. Beer (Plaintiff), *Appellant*,

versus

The National Bank of India (Defendants), *Respondents*.

Mr. Lowe and *Mr. Woodroffe* for Appellant.

The Officiating Advocate-General and *Mr. Phillips* for Respondents.

A, being in uncontrolled management of the National Bank in Calcutta, and purporting to act under a power-of-attorney, intended to be given to him in his private capacity, but addressed to him as "Acting Manager of the National Bank," by B, a constituent of the National Bank, without drawing any cheque on B's account, and simply by means of transferring in the books of the Bank Rs. 15,000 from B's deposit account with the Bank to the account of one C, who was indebted to the National Bank, purported to make an advance of Rs. 15,000 from B to C; whereas, in fact, the real transaction amounted only to transferring the liability of C to that extent from the Bank to B:

HELD that, so far as this transaction was concerned, A could not divest himself of his character of Bank Manager, and that, acting as the agent for both parties, he acted to the prejudice of B and to the advantage of the Bank, and that there was, in fact, a breach of his duty to B to which the Bank was a party.

HELD, also, that A was not able under the power-of-attorney to bind B by consenting to any dealings by the Bank or C with goods in the Bank's godowns which would prejudice B.

THE judgment of Macpherson, J., in this case was as follows:—

Macpherson, J.—The object of this suit is to recover Rs. 15,000, which the plaintiff alleges he has lost through the wrongful acts and defaults of the defendants, the National Bank of India.

The plaintiff had an ordinary deposit account with the National Bank, but was himself in Europe in the early part of 1870. Hearing about that time that Mr. David Anderson, a personal acquaintance and friend of his, had been appointed Manager of the Calcutta Branch of the National Bank, he became desirous that Anderson should act as his attorney and agent here. In order to carry out this desire, he sent him a power-of-attorney, dated the 18th February 1870, whereby he appointed "D. Anderson, Esq., Acting Manager of the National Bank of Calcutta," to be his attorney.

That power, on the face of it, is not a power-of-attorney to the National Bank of India. It is not drawn as powers-of-attorney ordinarily are drawn when intended to be given to a Bank; for, although Anderson is described as the Acting Manager of the Bank, there is nothing to show that the plaintiff intended that any other person acting as Manager should be his attorney. The words "Acting Manager," which occur after Anderson's name, were, in my opinion, simply descriptive of him, and do not mean to say that this power is given to him only as representing the Bank. There is no doubt that, where the intention is to give a power to a Bank, the practice is to make the instrument applicable, not only to the particular Manager whose name is given, but to any other person who may, for the time being, happen to be Manager.

However, as he was described as Bank Manager, Mr. Anderson had some doubts as to the plaintiff's intention, and (though he wrote to the plaintiff that he believed that he meant him to act for him privately) he thought best to treat it as a power-of-attorney to him in his official capacity, and he acted accordingly. In doing so, Anderson, as it seems to me, simply made a mistake and did not carry out the intention of the plaintiff. It is quite evident from the plaintiff's two letters to Anderson (of the 4th and 18th February 1870)—one prior to giving the power and one covering it—that the plaintiff's intention was to give the power to Anderson in his private capacity. And the plaintiff, in his letter of the 23rd of April expressly and unequivocally states that such was his intention. The plaintiff now says that he intended to appoint the Bank and not Anderson individually; but those letters are far more reliable evidence as to this matter than the plaintiff's recollections now—after he has quarrelled with the defendants—as to what were his intentions in February 1870.

Anderson accepted the power in his official capacity; and there is no doubt that, at the end of July 1870, he, as representing the Bank, acted as the plaintiff's attorney. It is not merely that, during that period when signing for the plaintiff, he signed as "Acting Manager." The Bank did act as the plaintiff's attorney, and did charge commission on what it did. This appears both from the general accounts rendered by the Bank to the plaintiff, and in the detailed accounts of certain special transactions, which were also rendered.

The Advocate-General repudiated the idea of the Bank being by any possibility liable for what was done while Anderson acted in his official capacity as the attorney of the plaintiff, on the ground that it is beyond the scope of a Banker's business to advise a customer as to his investments, and to exercise a discretion for him as to them. It is unnecessary for me to decide whether his contention is right or not, but I may remark that there are cases (of which Melville v. Doidge, 18 L. J., C. P., 7, is one) in which Banks have given extra accommodation to customers, and in which it has been held that their so doing was not beyond their powers, though not customary. The question, however, is immaterial in this case, because I do not think that Anderson was acting in his official capacity as attorney for the plaintiff at the time of the transaction as

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the Rs. 15,000, which is the real subject dispute in this suit.

Anderson having written to the plaintiff t he found himself trammelled by having act for him in his official capacity, and t he wished to have a fresh power sent addressed to him as a private individual, plaintiff, in July 1870, sent him such a wer. It reached Calcutta about the end that month or the beginning of August; I find, as a fact, that, from about that e, Anderson ceased to act in his official acity for the plaintiff, and that he thence-h transacted all his business in his pri-e capacity. He gave orders to his subor-nates in the Bank that commission was no ger to be charged on the transactions of plaintiff, and he changed his mode of ning receipts, &c, usually signing simply own name as attorney for the plaintiff, tead of signing, as formerly, as Bank nager. But although Anderson thus nged his mode of acting, he never for-lly produced or made use of the second wer which the plaintiff had sent him. He er even had the Indian Stamp impressed on it; and on the 19th of August, in knowledging receipt of the power, he wrote the plaintiff that he had not yet found it cessary to act under it. He says that the ginal power turned out to be sufficient for purposes, and that, although he had at t acted under it as Bank Manager, he nd that his dealings in his private capa-y under it were practically never ques-ned, and therefore he went on acting der it, though he had changed the character which he acted. I believe that this is really e true state of the case—that Anderson, in t, became aware that he had made a mistake treating the first power, as addressed to m officially; and that from August he, as were, reverted to what should have been position throughout. As I have already d, in my opinion, the power, but for the erpretation which he himself put upon it, ght perfectly well have been used by him along in his private capacity.

I should add that, even after Anderson used to act for the plaintiff on behalf of e Bank, he continued to use the defend-t's establishment for the purposes of the intiff's business. The only accounts, too, dered by Anderson, apart from private ers, were regular Bank accounts signed the Bank accountant and other officials, d rendered monthly. Mr. Chalmers, the sent Manager, but who then was account-t under Mr. Anderson, says these accounts were merely such accounts as the Bank renders to all absent depositors; but I think this is not quite so, as more details are given than, according to my experience, are usually given in ordinary depositors' accounts. The whole matter was conducted in such a confused and irregular way that it is perhaps difficult absolutely to clear up certain points. But one most substantial fact is almost conclusive in the Bank's favor, as showing that the Bank had ceased to act as the plaintiff's attorney—namely, that, after August, the Bank never charged any commission on sales or purchases, or interest or dividends realized, on the plaintiff's account. That the plaintiff and Anderson themselves considered that Anderson was then acting in his private capacity, is shown by the plaintiff's letter of the 21st September 1870, telling Anderson to charge the same commission that the Bank would have charged; and by Anderson's reply that it would be better to let the matter of commission stand over till the result of his management was seen.

So matters stood in the end of 1870, Mr. Anderson, acting as the plaintiff's agent and attorney, but in his private capacity only, and not as being Manager of the National Bank.

In the beginning of January 1871, one Child, a plumber and gasfitter, who carried on business under the style of Child and Co., owed the Bank Rs. 23,511, and by the end of the month, the balance due from him had been increased to something more than Rs. 38.000. As a sort of security for this debt, Child kept a considerable quantity of goods imported by him for the purposes of his trade in the godowns under the Bank. But he never gave the Bank any written agreement or letter of pledge, nor did the Bank ever have any distinct information as to the quantity or value of the stock in the godowns. Anderson can give no better account of his position as Bank Manager with reference to Child than that it was perfectly well understood between him and Child that the goods were placed there as security for his debt to the Bank; that he believed, but never attempted to ascertain as a fact, that there were goods there more than sufficient to cover the Bank's claim; but that Child was allowed to use such goods as he wanted for the purposes of his business, the godown being left open, and Child putting in and taking out goods at his pleasure without any check on the part of the Bank.

On the 31st of January 1871, Anderson, in his private capacity, as attorney for the

plaintiff, lent Rs. 15,000 to Child. The money never, in reality, passed through Child's hands; a simple transfer of Rs. 15,000 from the plaintiff's account to Child's account was made in the books of the Bank by order of Anderson acting as Manager of the Bank. On the same date, Child gave to Anderson a promissory note for Rs. 15,000, with interest at 8 per cent., payable to the plaintiff on demand. Child at the same time gave Anderson a letter in these terms :—

"*Calcutta, 31st January 1871.*

THE MANAGER, NATIONAL BANK OF INDIA, LIMITED.

DEAR SIR,—After satisfaction of any claims you may have against us, please hold at the disposal of Francis Beer, Esquire, as security for his loan to us of Rs. 15,000 only, all goods belonging to us in your possession.

Yours faithfully,

(Sd.) W. CHILD & Co."

This letter also was delivered to Anderson, who took it and the promissory note for Rs. 15,000 and placed them with the rest of the plaintiff's papers in the "Safe Custody Department" of the Bank. Anderson never took any action on Child and Company's letter of pledge in favor of the plaintiff; he never gave any special notice of its existence to any of the other officials of the Bank; and he allowed Child to deal as formerly with the goods in the godowns.

Shortly thereafter, Anderson wrote to the plaintiff telling him of his having lent Child Rs. 15,000. He added that, by way of security, he had a lien on a large stock of materials stored in the godowns under the Bank, and he represented Child to be in a highly prosperous condition, and the plaintiff to be fortunate in having a chance of lending him the money. But he did not tell him that Child owed the Bank a large sum, and that the Bank had a prior lien on the goods in the godowns.

In the middle of August 1871, Mr. Anderson was dismissed from his office of Manager of the defendants' Bank in Calcutta. Thereupon he transferred all the plaintiff's papers to the Chartered Mercantile Bank, and (exercising a power of substitution given him by the power of the 18th February 1870) he appointed the Manager of that Bank to be the plaintiff's attorney. In October, the plaintiff arrived in Calcutta, and went to the defendants' Bank and enquired about his security in the Bank's godowns. The new Manager, Mr. Chalmers, knew nothing of the plaintiff's lien, but claimed to have a lien on behalf of the Bank. Subsequently, Child's letter of pledge of the 31st January was found among the plaintiff's papers in the Chartered Mercantile Bank, and on the 24th of November formal notice of its existence was given to the National Bank, to whom it was sent for "registration and return."

The National Bank, from the 8th of November, when the new Manager first became aware that the plaintiff claimed to have a lien on the goods, locked up the godowns and allowed nothing more to be removed without being paid for. But even then no detailed account of the stock in the godowns was taken by the Bank.

Early in this year, Child failed in business and suddenly left Calcutta. The defendants sold off the goods in the godowns and realized some Rs. 8,000. But there is still an uncovered balance of more than Rs. 12,000 (including interest) due to the National Bank.

The plaintiff contends that the defendants are bound to repay him the Rs. 15,000 with interest, on the ground that the transfer of that sum to Child's account on the 31st January 1871 was substantially a fraud on Anderson's part of which the National Bank had notice, and derived the benefit; or at any rate, that the Bank is bound to account for the goods in the godown on the 31st January 1871, as the Bank then had notice of the plaintiff's lien on the goods and accepted it and thenceforth held the goods subject to it.

It is, I think, impossible to say that Mr. Anderson in lending the Rs. 15,000 to Child acted fraudulently towards the plaintiff. I believe he really thought it was a good investment for the money, and that he acted quite honestly in the matter. In saying this, I pay no compliment to Mr. Anderson on his discretion or on his mode of conducting business; for it appears to me to be simply marvellous that it should have been possible for a person in Child's position to have borrowed from the Bank such sums as were lent to him by Anderson on what can scarcely be called any security at all. There can be no doubt the Bank must be held to have had full notice of all the circumstances attendant on the loan of the plaintiff's Rs. 15,000. But that will not entitle the plaintiff to recover the money from them, Anderson not having acted dishonestly in the matter, and holding a power-of-attorney from the plaintiff which enabled him to act as he did.

Then, is the National Bank bound to account for the goods which were in the godowns? I think not. The Bank had notice of the plaintiff's rights in these goods on the 31st of January 1871. Of this I have no doubt; for the letter of pledge was addressed to the Manager of the Bank, and was delivered by Child to the Manager of the Bank; and what he chose to do with it afterwards is of no consequence to the plaintiff, so far as this question of notice is concerned. Having had notice, the Bank was placed under the obligation of treating the goods as subject to the plaintiff's claims, after they had themselves been satisfied. The assignment in this manner of goods is similar in principle to the assignment of a debt due from a third party; and in such a case it is sufficient if it be shown that the fact of assignment was communicated to the debtor, and express assent by the debtor unnecessary (Tibbits *vs.* George, 5 Ad. and E. 115). No express assent by the Bank was necessary. But I think that, in fact, the Bank did assent, and that it is impossible to hold otherwise, when it is borne in mind that the Bank had notice of all the circumstances connected with the transaction, and that Anderson was acting for both parties.

But though the Bank had notice on the 31st January, and assented to the charge, I do not think they are not liable to account for the goods, in the absence of any evidence to show that there ever at any time were any goods which could have been made available to the plaintiff's claim. If the plaintiff could show that the goods ever were sufficient to satisfy more than satisfy the Bank's claim, no doubt he might have a good cause of action; but failing to show anything of the sort, I think he is not entitled to a general decree for an account, in the hope of finding out how what was in the godowns, and what was its value. It is not to be forgotten that the Bank acted loosely and wrongly in the matter of their lien on Child's goods, the plaintiff did the same; for the plaintiff's letter of pledge gives no details of the goods nor their value. Moreover, if the Bank erred in not, after the 31st January, keeping an accurate account of the goods, the plaintiff had notice all along of the course of dealing followed by the Bank, and never objected to it if he did not actually assent to it. Anderson was the plaintiff's Agent and Mannger as much as he was the Agent and Manager of the defendants; and if the Bank is held to be affected with notice through him, the plaintiff must in like manner be held to be affected with notice through him. The whole matter was transacted by Anderson in the loosest and most unbusiness-like manner possible, and it seems to me very astonishing and most dangerous that a Manager of a branch of an institution like the National Bank should have it in his power to accept a trust such as that conferred upon him by the plaintiff, the duties connected with which must necessarily frequently clash with his duties as Manager of the Bank.

However, I do not think the plaintiff is entitled to relief as against the defendants, and I therefore dismiss his suit; and, if the defendants insist upon having their costs, the suit must be dismissed with costs No. 2.

The plaintiff appealed from this judgment on the following grounds:—

"*First.*—For that the learned Judge ought not, upon the evidence adduced and received in the suit, to have found that David Anderson, in the pleadings and evidence in the suit named and referred to, on the 31st day of January 1871, lent, in his private capacity as attorney for the plaintiff, the sum of Rs. 15,000, out of the moneys of the plaintiff in deposit with the defendant Bank to Messrs. Child and Company, but, on the contrary, should have held that Mr. Anderson acted in the premises in his official capacity as Manager of the defendant Bank.

"*Second.*—For that the learned Judge ought to have found that the transfer of the said sum of Rs. 15,000 from the plaintiff's account with the defendant Bank to the account of the said Messrs. W. Child and Company also kept with the said Bank, effected, as the learned Judge has found, by order of Mr. Anderson acting as Manager of the defendant Bank, did, under the proved and admitted circumstances of the case, constitute a fraud upon the plaintiff of such a character as to entitle him to maintain this suit against the defendant Bank for the recovery of the said sum of Rs. 15,000 with interest.

"*Third.*—For that the defendant Bank having derived the benefit flowing from the aforesaid transfer, and having had, as found by the learned Judge, full notice of all the circumstances attendant upon the said loan of the Rs. 15,000 to the Messrs. W. Child and Company, which loan was effected by way of transfer in the books of the defendant Bank in manner aforesaid, ought to have been held liable to recoup to the plaintiff the said sum of Rs. 15,000 and interest thereon.

"*Fourth.*—For that the learned Judge ought to have held that the defendant Bank had no valid lien over the goods of Messrs.

W. Child and Company, imported by that firm for the purposes of their trade, and stored in the godowns under the Bank, entitling the defendant Bank to priority over the lien held by the plaintiff upon the goods to secure the re-payment of the sum of Rs. 15,000 and interest at eight per cent., and should not have held the Bank entitled, as against the plaintiff, to sell the said goods and appropriate the sale-proceeds in satisfaction of the claim of the Bank.

"*Fifth.*—For that, even if it be conceded that the lien of the plaintiff over the aforesaid goods was posterior to that of the defendant Bank, the Bank having had, as found by the learned Judge, notice of the plaintiff's said charge or lien on the 31st day of January 1871, and having assented thereto, and thereby subjected itself to the obligation of treating the said goods as subject to the plaintiff's claim after satisfaction of the Bank's claim, ought to have been held bound to account strictly for the goods then in their godowns, and to make good the value of all such goods as were removed therefrom without being paid for, and ought not to have been exonerated from rendering such account, even in the absence of any evidence to show what the value of the goods was as on the 31st January 1871.

"*Sixth.*—For that the learned Judge is in error of fact in holding that there is an absence of any evidence to show that under any circumstances there ever could have been any goods available for the plaintiff's claim. There is evidence upon the record to establish that the goods were sufficient, on the 31st of January 1871, to cover the claims of both the plaintiff and the defendant Bank. Moreover, having regard to the fact of the case, the onus of showing that there were no goods, out of the sale-proceeds of which the plaintiff's lien could be satisfied, lay upon the defendant Bank, and not on the plaintiff

"*Seventh.*—For that the defendant Bank having, through its Manager, refused to permit Messrs. W. Child and Company to clear off or reduce the Bank's claim, and having permitted the aforesaid firm to deal with the goods as it chose, ought in equity to be postponed to the plaintiff; at all events, in taking an account of the defendant Bank's debt, no sum should be allowed to be charged as against the said goods to the prejudice of the plaintiff, which was advanced to, or permitted by, the Bank to be incurred as a debt by Messrs. W. Child and Company subsequent to the 31st January 1871. In estimating that there remained, after taking the sale-proceeds of the goods remaining in the godown at the time of the sale thereof by the defendant Bank, an uncovered balance of more than Rs. 12,000 due to the defendant Bank, the learned Judge has fallen into error. In fact, had the account prayed for been decreed, it would, as the plaintiff believes, have been found upon taking of the said account that the debt due to the Bank on the 31st January 1871, had been, if not entirely paid off, at least so far reduced as to leave a balance of the sale-proceeds of the goods sold applicable to the plaintiff's lien or charge.

"*Eighth.*—For that the learned Judge ought not to have held the plaintiff affected with notice of the course of dealing followed by the Bank with regard to the said goods subsequent to the 31st January 1871.

"*Ninth.*—For that, under all the circumstances of the case, the account prayed for should have been directed.

"*Tenth.*—For that the plaintiff's suit should not have been dismissed with costs."

Mr. Lowe (Mr. Woodroffe with him) for the appellant.—The first power-of-attorney was a power to the Bank to act for the appellant. That power was not revoked by the second power sent to Anderson, and nothing was done under the second power. If Anderson was in his private capacity the appellant's agent, yet it cannot be contended that Chalmers was, and he permitted Child to deal with the goods in the godowns as they had been dealt with during Anderson's management of the Bank. The respondents do not attempt to show what became of the goods. They had notice by the letter of the 31st January of the appellant's advance, and after that notice the Bank could not allow the goods to be dealt with to the appellant's disadvantage, nor could any of the Bank's subsequent advances take precedence of the appellant's claim (Hopkinson *vs.* Rolt. 9 H. L. 514). The Bank ought to have reduced the amount of its claim on the goods, or compelled Child to replace goods of equal value to those he took out. These goods were not to be a security generally for any advances the Bank might make. The Bank, dealing with these goods as it has done, ought now to render us an account of what they were, and it is not for the appellant to show what was in the Bank's possession. Anderson had no authority under the power to authorize the Bank to deal with the goods as it was doing, and notice of such dealing to Anderson would not affect the appellant

rry *vs.* Holl, 2 DeG., F. and J.; Attwood Munnings, 7 B. and C. 278). He must e had express notice of such dealing, or e assented to it when it came to his owledge to have been bound.

The Officiating Advocate-General (Mr. ll).—The first power was never intended be a power to the Bank, but was to derson in his private capacity. The words *cting Manager*" were descriptive merely. e appellant required his attorney to advise in his investments, and that the Bank ld not do. It has been held in Bishop *vs.* Countess of Jersey (2 Drewry 143) it is not part of a Banker's duty to ise his constituents. [*Pontifex, J.*—t was the case of a private bank. Acding to the Articles of Association, one of objects of the National Bank is "to est."] Yes, but not to give advice regard- the investment. [*Pontifex, J.*—The icles of Association also contain the words negociate loans."] That is, that the k will only negociate such loans as its stituents may direct, but the Bank does undertake to initiate loans. Those words not extend the Banker's duty and make an adviser. The power-of-attorney was Anderson in his private capacity, and the ellant is bound by the acts of his attorney. is not entitled to an account of the ds from the Bank, nor is the Bank liable the appellant, by reason of anything equent to Child's insolvency.

Mr. Phillips (on the same side).—The ellant's contention is threefold: *first*, that Bank was his agent, and as such agent d improperly; *second*, if Anderson was agent, Anderson, being Manager of the k, committed a fraud to which the Bank a party, and therefore the Bank is liable any loss sustained by the appellant; d, if Anderson alone was the appellant's nt, and the Bank is in no way connected the transaction with Child, yet the Bank in a position of trust to the appellant, and efore liable. With regard to the first conion, assuming that the Bank was the ellant's agent, it is argued that the Bank not entitled to any profit to itself ing out of this transaction since it an agent, or that it is liable in damages reason of its negligence. Anderson havalready been appointed the appellant's nt, the powers were given to him, not the purpose of appointing him agent, to show that he had authority to act. was the adviser and director in the apant's behalf, the Bank merely the instrument to carry into effect Anderson's plans. The Bank never was the directing head; it was Anderson in his private capacity, and, therefore, the Bank was never responsible for this loan. Again, if the Bank was the agent, this was a proper and *bonâ-fide* investment, which subsequently proved to be an unfavorable one, and the Bank cannot be held liable for that reason. The appellant further contends that the original investment was fraudulant and that the Bank derived the benefit, and that the Bank was guilty of fraud in allowing Child to deal with the goods, and that, therefore, the appellant's mortgage ought to have priority, and the Bank ought to account. The evidence entirely disproves any fraudulent collusion between the Bank and Anderson. The appellant has no right as second mortgagee to an account as against the first mortgagee. The first mortgagee is not a trustee for any one till he has been paid off, and the creation of a second mortgage does not impose other duties on him by which he was not previously bound. [*Pontifex, J.*—A mortgagee in possession must account for wilful default.] Yes, but not for not letting at the best rent, and in no case unless he has been paid off. The appellant has not proved that the Bank has been paid off, and Mr. Justice Macpherson has found that the security was not sufficient. Distinct notice ought to have been given to the Bank of a second incumbrance to give the appellant the benefit of the assignment (Shaw *vs.* Foster, L. R., 5 H. L. 321). There may have been notice to the Bank indirectly by reason of Child's declaration, but all that that notice could effect would be that the Bank might be bound to give the appellant the same advantages as the Bank had been giving to Child.

Mr. Lowe was heard in reply.

The Court reserved its judgment, which was delivered as follows on the 14th January 1873 by—

Couch, C.J.—Francis Beer, the plaintiff in this case, being at the time in Europe, executed a power-of-attorney, dated the 18th of February 1870, authorizing D. Anderson, Esq., "Acting Manager of the National Bank of Calcutta," to receive from one O'Keefe his property at Calcutta, consisting of shares, securities and cash, and to invest the same, to purchase or sell stock, and to receive dividends, and generally to execute and perform all acts relative to the premises.

Under its Memorandum of Association the National Bank was established (among other objects) to receive deposits of money, to raise

and make and negotiate loans and invest moneys, to take and realize securities, and to act as agents in money-matters for private persons.

Upon the receipt of the power-of-attorney, Mr. Anderson assumed that it had been given to him, not in his private capacity, but in his character of Bank Manager.

He, accordingly, as Manager of the Bank, received from O'Keefe certain shares, securities, and cash belonging to the plaintiff, in whose name an account was opened or continued at the Bank.

Mr. Anderson acted under this authority, and the plaintiff was debited by the Bank with commission and other charges in respect of such action until the receipt of a subsequent power-of-attorney, dated the 1st of July 1870.

On the 4th of May 1870, Mr. Anderson wrote to the plaintiff, stating that acting officially as Manager of the Bank, he was hampered in dealing with plaintiff's affairs under the power-of-attorney of the 18th of February, and suggested that a fresh power should be sent to him in his private capacity.

The plaintiff, accordingly, on the 1st July of 1870, executed and transmitted to Anderson a fresh power-of-attorney in which Anderson's description as Bank Manager was omitted.

Upon the receipt of the last-mentioned power-of-attorney, the Bank ceased to charge the plaintiff with commission as theretofore, but periodical statements of account, signed by the officers of the Bank, which showed in detail all the dealings with the plaintiff's property by the attorney, were sent to the plaintiff. The first power-of-attorney was stamped under the Stamp Law, and was registered by the Bank and the various companies with which dealings took place thereunder.

The second power was neither stamped nor registered, and was never produced in the conduct of the plaintiff's business.

Under this state of circumstances, one Child, a gas-fitter, was, on the 31st of December 1870, indebted to the Bank for advances to the extent of Rs. 23,511, and a considerable part of his stock-in-trade was deposited in the godowns of the Bank. No document was produced by the Bank to show the terms on which this deposit was made, and it must therefore be considered that, on the 31st of January 1871, the goods of Child, then in the godowns of the Bank, were held by it as a simple pledge for the debt then due from him.

Between the 31st of December 1870 and 31st of January 1871, Child's indebtedness to the Bank increased from (in round numbers) 23,000 rupees to 38,000 rupees.

It is not clear in respect of what transactions this increased amount became due, but from Schedule B to the defendant's written statement and from Anderson's evidence, it appears probable that a very considerable proportion was advanced to enable Child to take up bills against shipments of goods which had been made to him from Europe before the beginning of January 1871.

Anderson in his evidence states that he made these advances to Child throughout January from the moneys of the Bank, with the express intention, when they should amount to a sufficient sum, to subsititute the plaintiff's money for that of the Bank. But however this may have been, the plaintiff clearly has the right as against the Bank of insisting that, on the 31st of January 1871, Child was indebted to the Bank in the sum of Rs. 38,000.

On that day Anderson, without drawing any cheque on the plaintiff's account, and simply by means of transferring in the books of the Bank Rs. 15,000 from the plaintiff's account to Child's account, purported to make an advance of the Rs. 15,000 from the plaintiff to Child, but in fact the real transaction amounted only to transferring the liability of Child to that extent from the Bank to the plaintiff. On the 8th of February 1871, Anderson wrote to the plaintiff, stating: "I lately lent Rs. 20,000 for you with absolute safety at 8 per cent. I will give you details in my next."

On the 1st of March, Anderson wrote again as follows: "You will probably have observed from the copy of your account that your funds are presently all employed, as I lent Rs. 20,000 in two loans at 8 per cent. W. Child and Co., Rs. 15,000. Child is a plumber and gas-fitter, a steady, pushing, and industrious tradesman. His shop and showroom form part of the premises leased by the Bank, and I know his position intimately. He has got several large contracts for water-fittings and has in consequence been obliged to lay in a large stock of material which is stored in the godowns under the Bank, and over which I have a lien as security for the advance, although I scarcely consider such to be necessary, as Child has made a good bit of money, and is doing exceedingly well. Robert Windram, Rs. 5,000. * * * * Both these loans are quite safe, and my only fear is that they may be paid off too soon. I would have granted them on behalf of the

k, only I did not like to see your balance aining so long unemployed."

he account referred to by Anderson in letter was one of the periodical accounts ished and signed by the Bank's officers, stating the alleged advance to Child.

may be noticed in passing that the letter eals altogether the material facts that d was already indebted to the Bank in 23,000, and that the property alleged to been pledged for the Rs. 15,000 was le to the prior pledge thereof for the of the Bank. These facts were not ght to the plaintiff's knowledge until his rn to India, when he at once claimed to ndemnified by the Bank.

t does not appear what specific goods of ld's were, on the 31st January 1871, osited in the Bank godowns, but Anderson's er refers to them as sufficient security for Rs. 15,000 advanced by him on plaintiff's alf, and the only evidence on the subject hat of Anderson himself, who says: "On 31st of January, the Bank was secured inst Child's debt. I considered there was cient security for both debts"—meaning Rs. 23,000 and the Rs. 15,000.

On the 31st of January 1871, Child, in sideration of the alleged advance of the 15,000, wrote and delivered to the Manager the Bank a letter in the following words:—

"*Calcutta, 31st January 1871.*

HE MANAGER, NATIONAL BANK OF INDIA, LIMITED.

DEAR SIR,—After satisfaction of any ims you may have against us, please hold the disposal of Francis Beer, Esquire, as urity for his loan to us of Rs. 15,000 y, all goods belonging to us in your ssession.

Yours faithfully,
(Sd.) W. CHILD & Co."

Child, at the same time, signed and deli- ed to Anderson a promissory note for 15,000 payable to the plaintiff or his order. The Bank being at that date a mere dgee, the ownership and general right of perty in the pledged property remained in ild, who was entitled, subject to the Bank's n, to make any disposition of the goods, d to direct that they should be at the aintiff's disposal, and the Bank, after such ection, would not be justified in dealing th the pledged property without giving ice to the plaintiff.

Between the 31st of January and the nth of November, Child was permitted to move from the godowns of the Bank such ts of the pledged property as he chose, without in any way accounting for its value or specifying the articles removed, and there can be no doubt that, when in November the Bank put a stop to Child withdrawing the pledged property, the value of the goods then remaining in the godowns of the Bank was very greatly reduced.

In the interval, namely, in August, Mr. Anderson was dismissed from the service of the Bank, and early in November, the plaintiff returned to Calcutta, and found among his securities, which had been removed by Anderson to the Chartered Mercantile Bank, the promissory note and letter of the 31st of January 1871. Up to this time he had every reason to believe that his money had been actually advanced to an unembarrassed man upon the security of unincumbered stock-in-trade. He immediately made inquiry at the defendant Bank, and by letter addressed to the Manager and dated the 22nd November, he called on it to pay him the Rs. 15,000 on the ground of fraud. He wrote: "* * * Messrs. W. Child and Co. were at that time indebted to your Bank in a much larger sum than that named, and the said sum of Rs. 15,000 was not paid to them, but simply carried to their credit with the Bank in reduction of their debt to the Bank. The representation as to the security taken was untrue, for the Bank at the time held an assignment of, or had a lien on, as I have since found out, the entire stock-in-trade and assets of W. Child and Co. Thus to sum up the matter, by the act of the Manager of the Bank, accompanied by a misrepresentation, your Bank reduced an outstanding by, and pocketed, a sum of Rs. 15,000 taken from the funds of a depositor with them. * * * Under these circumstances I claim the sum of Rs. 15,000, and to be placed in the position in which I stood before the grossly improper action of the Manager took place. In case your Directors refuse to comply with my request, I shall be obliged to take such legal measures as I may be advised to take immediately.

I remain,
Yours faithfully,
FRANCIS BEER."

Again, on the 29th of November, the plaintiff wrote: "As I have with the Bank a joint lien on the property in the Bank's custody, you will please take notice that no stock is to be taken out without payment to me of my *pro-rata* share in the same, and that I shall hold the Bank responsible for

any goods that may be given up without this distribution. Awaiting your further reply,

I remain,

Yours faithfully,
F. BEER."

To which Mr. Chalmers, the then Manager of the Bank, on the same day answered: "I have to acknowledge your letter of date, and, in reply, beg to state that we do not recognize in any shape your so-called joint claim on the goods in our godown. The letter sent us by the Mercantile Bank clearly proves your interest is merely reversionary, and only begins when the Bank's ends.

Yours faithfully,
J. CHALMERS,
Acting Manager."

On the 18th of January 1872, Child was, on the petition of the Bank, adjudicated insolvent.

The Bank having in the meantime refused to give the plaintiff a list of Child's goods then in the Bank's godown, on the plea that they themselves had no list, ultimately sold the goods in the godown by tender, and without giving plaintiff notice of the sale, or affording him any opportunity to redeem.

The sale realized Rs. 8,242 net, and although, according to Schedule B, between the 31st January and 30th of November 1871, Child had been credited by the Bank for payments in cash and cheques (exclusive of cross demands by Child for gas and water-fittings), amounting to more than Rs. 34,000, none of which payments was made specifically for any particular goods removed from the godowns, the Bank insisted upon its right to retain the entire proceeds of the sale against an alleged balance of Rs. 18,215 made up (exclusive of interest) by rent to the amount of Rs. 900, and further advances to the amount of about Rs. 11,400.

Under these circumstances the plaintiff instituted the present suit, in which he prayed, though not in very precise language, alternative relief either that the Bank should be decreed to repay to him Rs. 15,000 with interest, upon the ground that he was entitled, under the circumstances attending the alleged advance of the Rs. 15,000, to priority over the defendants, or for an account of the stock-in-trade in the Bank's godowns on the 31st of January 1871, and payment by the Bank to the plaintiff of what should appear on such account to be excess value of the said stock over the Bank's debt on 31st January 1871.

The arguments before Mr. Justice Macpherson appear to have been confined principally to the questions whether or not the power-of-attorney, under which Anderson acted, was given to him, and whether or not he acted under it in his private capacity or in his character of Bank Manager, and whether, in transferring Rs. 15,000 of Child's debt from the Bank to the plaintiff, Anderson acted fraudulently towards the plaintiff. Mr. Justice Macpherson held that, at all events, from the date of the arrival of the second power, Anderson acted exclusively in his private capacity, and that in such capacity he was affected with notice of, and was bound by, the acts or neglects of the Bank with respect to the stock of Child in the Bank godowns, and that the plaintiff was bound through him; and he further held that the transfer of the debt of Rs. 15,000 by Anderson from the Bank to the plaintiff was made in good faith for the benefit of the plaintiff.

With respect to the account asked for by the plaintiff, Mr. Justice Macpherson held that, "if the plaintiff could show that the goods ever were sufficient to do more than satisfy the Bank's claims, no doubt he might have a good cause of action," but that the plaintiff had failed to show this.

Accordingly the plaintiff's suit was dismissed with costs.

From this decision the plaintiff has appealed.

In argument before us it was admitted by Counsel on behalf of the Bank that there were no directors or officers of the Bank at Calcutta who could control Anderson's proceedings. Indeed, this fact was strongly insisted on as contradicting that part of the evidence—relied on as very material by the appellant's Counsel—which went to show that Anderson made the transfer of Rs. 15,000 under pressure from his Directors in order to reduce the amount of Child's account. The Counsel for the Bank insisted that the whole of the Rs. 15,000 was advanced by the Bank between the 1st and 31st of January, and, therefore, that it was obviously impossible that any pressure could have been exerted on Anderson before the 31st of January, inasmuch as there was no one at Calcutta to exert such pressure; and probably this was true so far as the Rs. 15,000 was concerned, though it is clear from Anderson's evidence that his Directors had, at some time or other, referred to Child's account with dissatisfaction and distrust.

The fact of Anderson being in uncontrolled management of the Bank at Calcutta,

ch fact does not appear to have been ght to the knowledge of Mr. Justice pherson, renders it unnecessary for us ter upon the question whether, on the of January 1871, Anderson was acting er a power-of-attorney given to him in private capacity or in his character of k Manager. We think it clear that, so as the transaction of the Rs. 15,000 is erned, Anderson was the Bank.

he mere fact that, in the accounts ren- d by the Bank to the plaintiff, the Bank ed to charge a trifling commission, can- under the circumstances of this case, the character of the transaction by erson, who at the time was the sole nt at Calcutta both of the Bank and of plaintiff. We must hold that it was as ossible for Anderson then, as it is for us , to separate his individuality; and that, g for both parties, he was bound to act y between them, and that neither party ntitled to take advantage of his acts to prejudice of the other party

the transaction was an improper one, ust fall under the general rule that the loyer is answerable for every such wrong he servant or agent as is committed in course of the service and for the em- er's benefit, though no express command rivity of the employer be proved.

he question remains—was the transfer Anderson in the books of the Bank of 15,000 of Child's debt from the Bank to plaintiff a proper transaction?

s between the Bank and the plaintiff, it be taken that, on the 31st of January , a speculative gasfitter was indebted to Bank in Rs. 38,000. From that amount 15,000 were written off in the Bank's s, and the plaintiff's account was at the e time debited therewith. Even if the 38,000 were sufficiently secured by the ds in the godowns of the Bank, the security not a desirable one for the plaintiff. on that assumption, the Bank being a e pledgee with notice would be liable to unt to the plaintiff for the value of the ds, for having allowed Child to deal with greater part of such goods at his free will, hecked, and for having sold the residue out notice to the plaintiff. And in g such account, the Bank would not be led to claim, in priority to the plaintiff, her advances made after notice of his est, which notice, we agree with Mr. ice Macpherson, must be taken to have duly given to the Bank on the 31st of ary 1871.

It has, indeed, been argued before us that in the transfer of Rs. 15,000 of Child's debt from the Bank to the plaintiff, Anderson paid more regard to the interest of the plaintiff than to that of the Bank; and that, inasmuch as the power-of-attorney authorized a loan on simple personal security, it was immaterial whether the goods of Child in the godowns of the Bank were or were not sufficient security for the Rs. 15,000. It is scarcely necessary to point out, in answer to this argument, that a loan on personal security to an unembarrassed man is quite a different matter to a loan to a person already involved, and upon the security of stock-in-trade already pledged for Rs. 23,000.

It is impossible for us to believe if Child had been indebted to any third person, and had pledged his stock for Rs. 38,000, that, in such case, Anderson would have advanced Rs. 15,000 of either the plaintiff or the Bank for the reduction of such debt, and upon the security of a second charge on the stock in-trade.

It appears to us that the account of the transaction given by Anderson in his letters to the plaintiff was a false and dishonest account, deliberately concealing material facts and amounting to such wilful misrepresentation as leads to an irresistible presumption that he was, in fact, sacrificing the interest of the plaintiff for the benefit of the Bank.

The case of Bishop *vs.* The Countess of Jersey, 2 Drewry 143, which was pressed upon us in argument, does not in the least affect the case before us. There a lady was improperly induced by one of the partners in a Bank to lend £5,000 to his son on the security of his promissory note. She herself drew a cheque on her account at the Bank with full knowledge of the purpose for which it was required, and of the nature of the security; and there was, and could be, no pretence of any benefit accruing from the advance to the other members of the firm; for the borrower was not, as in this case, a debtor to the firm whose debt was reduced by the loan.

We decide the case before us on the ground that Anderson, having at the time the uncontrolled management of the Bank, could not divest himself of his character as Bank Manager, and that, acting in the transaction as agent for both parties, he acted with wilful unfairness between them to the prejudice of the plaintiff and to the advantage of the Bank. There was in fact a breach of his duty to the plaintiff to which

the Bank by him, as its Manager, was a party.

The transaction never amounted to more than this, that Anderson by a few scratches of the pen in the books of the Bank, attempted to transfer the liability of Child to the extent of Rs. 15,000 from the Bank to the plaintiff, leaving the Bank with a first charge of Rs. 23,000; and that, in truth, there never was any real advance of any part of the plaintiff's money to Child.

Deciding the case on this ground, it is not unnecessary for us to direct any accounts to be taken, and indeed it would now be impossible to take any proper account in consequence of the carelessness of the Bank in permitting Child to remove his goods unchecked from the godowns of the Bank; but we think, in any view of the case, Anderson was not able, under the power-of-attorney, to bind the plaintiff by consenting to any dealing by the Bank or Child with the goods in the Bank's godowns, which would prejudice the plaintiff.

We reverse the decree of the Court below, and order that the defendant Bank do pay to the plaintiff Rs. 15,000, with interest at 6 per cent. per annum, from the date of the institution of this suit, subject, however, to a deduction of the amount of interest with which the plaintiff's account with the Bank has been credited as paid by Child—the amount of such deduction to be verified by affidavit. The Bank must also pay the costs of this suit on scale No. 2.

The 14th January 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Sale—Irregularity—Act VIII. of 1859. s. 256—Winesses—Expenses.

Case No. 288 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of East Burdwan, dated the 2nd July 1872.

Chunder Sekhur Deb (Judgment-debtor), *Appellant,*

versus

Jadub Chunder Sett (Decree-holder), *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboo Sreenath Doss for Respondent.

By s. 256, Code of Civil Procedure, no irregularity in conducting a sale, however material, is sufficient to vitiate the sale, unless it entails substantial injury to the party seeking to have the sale set aside.

People of rank and wealth, when summoned as witnesses to a distance from their place of residence, are entitled to travelling and other expenses suitable to their circumstances.

Glover, J.—THERE is no ground for this appeal.

It has been contended that the selling of three lots in one lot was a material irregularity sufficient to vitiate the sale. By section 256 of the Civil Procedure Code any irregularity in conducting a sale, however material it may be, is not sufficient to set the sale aside unless it is proved, to the satisfaction of the Court, that the party seeking to have the sale set aside has sustained substantial injury by reason of such irregularity. No attempt has been made in this case to prove that any substantial injury has been sustained, and the Judge has found as a fact, which there is no evidence to controvert, that the money obtained by selling the three lots together was more than could possibly have been obtained by selling each lot separately.

It is then said that the Subordinate Judge acted improperly in not summoning the witnesses named by the appellant. We find that the Subordinate Judge did order summonses to be served upon all the witnesses named; but as they were people of rank and wealth and residents of places distant from the Court, he directed that, before the summonses were served, the appellant should pay five and twenty rupees for each witness as travelling and other expenses. One of the witnesses was Baboo Joy Kishen Mookerjee. The appellant did not pay the sum demanded, nor did he show that it was in any respect too large. The witnesses had to travel 70 or 80 miles, and it could not be expected that they should go to such a distance for the subsistence-allowance of coolies.

The appeal is dismissed with costs.

The 15th January 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Limitation—Act XIV. of 1859, s. 1, cl. 15.

Case No. 53 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 6th February 1872.

Narain Lall and another (two of the Defendants), *Appellants*,

versus

la Nund Kishore Lall and others (Plaintiffs) and others (Defendants), *Respondents*.

Mr. R. E. Twidale for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

e only way in which effect can be given to the "in the meantime" in Act XIV. of 1859, s. 1, 5, is by holding that they refer to the periods had been previously mentioned; and the proper ruction of the clause is that the acknowledgment be given within the period of 30 or 60 years, ding to the nature of the property.

ouch, *C.J.*—UPON the first question, ely, whether the kobala was an acknowment in writing sufficient to prevent operation of the law of limitation, we k that the proper construction of se 15, section 1, is, that the acknowment must be given within the period of ears or 60 years according to the nature e property. If the words "in the mean-" were left out of that clause, it would like section 4, and would allow the owledgment to be given at any time re the suit was brought. So far from ion 4 assisting the respondent, we think ther has the opposite effect, because n we see the words "in the meantime" clause 15, we must suppose that the islature introduced them for some pur-, and, if effect can be given to them, we bound to do so. The only way, as it ns to us, in which we can give effect to e words is by holding that they refer to periods which had been previously mened, the 30 years or the 60 years; and ough there does not appear to have been express decision on this point, and what e been quoted to us are only *obiter dicta*, agree with them. We think that the fair ordinary meaning of clause 15 is that acknowledgment must be given within 30 or 60 years, and there is reason for posing that the Legislature intended that, the long period which is given to the tgagor to bring a suit against the mortee—very different from the time of limitn prescribed in the cases to which the section applies.

hen as to the question of fact which been argued in this appeal, namely, ther the *ekrarnama* is a genuine docut, it is not disputed that the reasons, ch the Subordinate Judge gives for his opinion that it is not genuine, are correct. What he says with regard to the witnesses is quite true, and it appears to us improbable that these mortgagees, after the lapse of so long a time, would enter into an agreement, of this kind, and give up all the advantage which they must have had in any litigation, even supposing that the suit might, under the then law of limitation, have been commenced against them. Looking at the improbability of their doing that, the evidence is not at all such as would lead us to the conclusion that this *ekrarnama* was really given It appears to be correct that the plaintiffs abstained from examining two of the witnesses whom they might have examined. The witnesses were present, but the plaintiffs would not pay their expenses. If that was so, it is significant, because it is scarcely likely that, if these witnesses would have supported their case, they would not have paid their expenses, one of them being the person who appeared before the Cazee. Their not examining them may probably be accounted for by their having reason to suppose that, if they did so, they would not have supported their case.

Then the Subordinate Judge remarks with regard to the registration before the Cazee, that there is an omission of the descriptive roll of witnesses which he says it was customary to enter. This was certainly a case in which it was incumbent upon the plaintiffs to prove satisfactorily that this *ekrarnama* was really given, and the witnesses whom they examined for that purpose contradicted each other. We can see no reason for thinking that the conclusion which the Subordinate Judge came to, he having the witnesses before him, is a wrong one.

The decree of the lower Court must be reversed, and the plaintiffs' suit dismissed with costs in both Courts.

The 15th January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges*.

Hindoo Law—Alienation by widow—Legal Necessity.

Case No. 609 of 1872.

Special Appeal from a decision passed by the Judge of Patna, dated the 12th October 1871, affirming a decision of the Subordinate Judge of that District, dated the 26th July 1870.

Lalla Byjnath Pershad and others (Defendants), *Appellants.*

versus

Bissen Beharee Sahoy Singh (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Debendro Narain Bose* for Appellants.

Baboos Mohesh Chunder Chowdhry and *Hem Chunder Banerjee* for Respondent.

Where an estate devolved to a widow almost unencumbered, with an ample income more than sufficient to pay a small debt due by the husband, the Government revenue, and all other expenses including the marriage of daughters, the widow was held not to be justified by any legal necessity in alienating the estate in the absence of any actual pressure, such as an outstanding decree or impending sale for arrears of revenue.

Kemp, J.—THE defendants are the special appellants.

The suit is brought by the guardian of the plaintiff, who is a minor, for a declaration that certain alienations made by Bugwanee Kooer, the widowed maternal grandmother of the minor, are invalid so far as his reversionary interest is concerned.

The Subordinate Judge, in a careful judgment, found that these alienations were invalid under the Hindoo law, and passed a decree in favor of the plaintiff.

On appeal, the Judge of Patna states that the only point argued before him was whether these alienations were valid or not under the Hindoo law.

The Judge remarks: "That the original "transactions, namely, the bonds, have not been "produced, nor does it appear that they were "registered." Looking to the recitals in the ijaranama or lease, the Judge is of opinion "that the loans were *primâ facie* contracted "for purposes sanctioned by the Hindoo "law;" but that "looking to the income of "the estate, and the fact that the debts, if "any, left unpaid by the husband were very "insignificant, the usufruct of the estate was "more than ample, and should, with ordinary "prudence, have fully provided for all legal "necessities;" further, that "the main items "of the debt consist of expenses borrowed "at intervals, which fact alone ought to have "excited the suspicion of any *bonâ-fide* pur-"chaser;" again, that "there is nothing to "show how the widow expended the income "of the estate, and what necessity there was "for her borrowing such large sums."

As to the purchaser, the Judge remarks that "he is one of the leading vakeels of "the Patna Civil Court; that he is a man of "considerable experience and legal attai-"ments; that he took no steps whatever t "inquire into the circumstances which le "to the alienations; that had he done so, hi "suspicions must have been aroused, see "that he was purchasing only a widow "estate; that there was no evidence "the original debts, and that none of th "bonds, the authenticity of which is doub "ful, had been registered; and that it w "not sufficient for the purchaser to trust "a title conveyed by a sale in execution In the concluding portion of his judgme the Judge observes "that as he entire "agrees with the Subordinate Judge, "abstained from entering more fully into th "other points of the case."

In special appeal the grounds taken are:-

1st.—That the Judge has committed error in law in the investigation of the ca in considering that the bonds have not be produced in the case, and that they were n registered, as some of the bonds were p duced, and most of them are registered.

2nd.—That the bonds show that the were debts existing during the lifetime the husband, and that this is sufficient justify the purchase of the special appella

3rd.—That the debts contracted by t widow for the marriage of daughters a for the payment of the Government reven are legal necessities under the Hindoo law.

4th.—That the Court below, in decidi the case, ought to have been governed by t principle laid down in the case of Hunoom Pershad Pandey, reported in the 6th volu of Moore's Indian Appeals.

5th.—That the mismanagement or othe wise of her estate by the widow is not t question to be decided in this case, but wh ther, at the time of the purchase by th special appellant, there were debts contract by the widow for legal necessities.

6th.—That the widow was entitled t spend the whole of the usufruct of th estate, and was not bound to defray the ex penses attending the marriage of daughte from the same.

These grounds have been taken almo *verbatim* from the petition of appeal.

On the first ground, we find, on referri to the record, that the Judge was not strict correct in stating that none of the bon have been produced or registered, as som have been produced and some are registered but the Subordinate Judge has found th there was no sufficient evidence to establi the genuineness of these bonds, and that the authenticity was very doubtful, and th

dge has concurred entirely with this find-g of the first Court.

On the second and third grounds, we find t there were only two small debts which e left unpaid by the husband, namely, for Rs. 800 and one for Rs. 200. The sband died in 1257. The estate left him comprised eleven villages, the income one of which is alone from Rs. 3,750 to 4,000. The value of the whole estate left the husband must have been very con-rable, for we find that the defendant, cial appellant, took objection to the valua-put upon a fractional portion of it by plaintiff, namely, on a 1 anna 8 pie share, mating that share to be worth Rs. 20,000. debt appears to have been contracted the widow from the death of her hus-d in 1257 until 1261. She was left a ow with two unmarried daughters, one hom has since died childless, and with a e income at her disposal. There was, efore, no such legal necessity pressing on her to justify any alienation of her band's estate for the payment of the small t incurred by him during his lifetime or the expenses attending the marriage of daughters. Further, the Subordinate dge observes, and very properly so, that mere recital of a debt as due by the hus-d, or as incurred for marriage of daughters bond in the absence of any proof, is not icient. No unsatisfied decree as against husband has been put in, and there is no dence that the recitals in the bond which e not been proved are true recitals.

On the 4th, 5th, and 6th grounds, we are opinion that the Courts below have not sight of the principle laid down in the e of Hunooman Pershad Pandey, Moore's vy Council Reports, Volume VI., which mences at page 392; nor can it be said the present case that the charges, if proved, ch the Courts below find not to be case, were such as a prudent owner ld make in order to benefit the estate. d this been so, the *bonâ-fide* lender or rchaser from such lender would not be cted by the precedent mismanagement, d none is proved, of the estate. There no actual pressure on the estate; no ger such as an unsatisfied decree outstand-against the husband; no impending sale arrears of the Government revenue. e estate, as already shown, devolved to widow almost unencumbered; the income an ample one and more than sufficient pay the small debt due by the husband, Government revenue, and to provide all the expenses of the widow and her daughters. The special appellant, who is a vakeel of the lower Court, has purchased the rights and interests of the widow at a sale in execution of a personal decree against her. He has purchased at a very inadequate price, and with full knowledge that the widow's estate was a limited and a qualified one. On the whole case, we entirely concur with the Courts below, and dismiss the special appeal with costs.

The 15th January 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree incapable of execution—Act VIII. of 1859. s. 190.

Case No. 268 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 29th June 1872, affirming an order of the Moonsiff of Serajgunge, dated the 29th November 1871.

Dwarkanath Roy (Judgment-debtor), *Appellant,*

versus

Jannobee Chowdhrain (Decree-holder), *Respondent.*

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Appellant.

Baboo Sreenath Doss for Respondent.

A decree which was passed for a specified quantity of land contiguous to plaintiff's estate, but which gave no boundaries of such land, was held, with reference to Act VIII. of 1859, s. 190, to be indefinite and incapable of execution.

Glover, J.—THE special respondent in this case got a decree for 7 khadas 14 pakees 12 kanees of land, which he sued for as contained within a certain specified area, boundaries being given in the plaint. On measurement, however, it was found that these boundaries contained a great deal more land, and the decree was, therefore, for 17 khadas 14 pakees 12 kanees to be taken out of that land, no boundaries being given in the decree. The case comes before us in execution. The Judge has considered, concurring with the lower Court so far, that the decree was sufficiently accurate, and could be executed.

In special appeal it is contended that the decree is altogether indefinite and cannot be executed, inasmuch as no boundaries are given of the land which is to be given to the plaintiffs. The words of the decree are, that the land is to be given contiguous to the plaintiff's land, but it might be so given either at one or other end of his land, or in the middle of it—in all of which cases it would still be contiguous.

We think there is no occasion for us to go into the merits of the case with reference to the provisions of section 190 of the Code of Civil Procedure. That section says that when a suit is for land or other immoveable property with specified boundaries, if the decree be for the recovery of a portion only of such property, it *shall* specify the boundaries of the land or property adjudged.

In this case, the decree being for a portion only of the land in suit, the boundaries of the land decreed ought to have been specified, and, therefore, on this ground alone, we think that the special appeal should be allowed and the decisions of the lower Courts reversed with costs.

We think it only fair to mention that, in the course of the argument, the special appellant offered through his pleader to give up to his opponent 7 khadas 14 pakees 12 kanees of land in a position specified in the map, and which is as nearly as possible conterminous with the plaintiff's land, and that the pleader for the respondent, although fully warned of the probable effect of section 190, refused to consent to the arrangement.

The 15th January 1873.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Execution—Act VIII. of 1859, s. 200.

Case No. 311 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 13th November 1872.

Bhoobun Mohinee Debia (Judgment-debtor), *Appellant,*

versus

Gobind Chunder Mojoomdar (Decree-holder), *Respondent.*

The Advocate-General and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboos Romesh Chunder Mitter, Rash Beharee Ghose, and *Grish Chunder Mookerjee* for Respondent.

The District Court gave a decree for certain immoveable and moveable property specified in the schedule annexed to the plaint, and made an order that the Ameen was to ascertain the extent of the moveable property. In execution, the Court ordered the Ameen to give possession to the decree-holder of such of the said moveables as he could find, and to inquire into the nature, amount, and value of such as he could not find.

HELD that it was not necessary to construe this order as giving in execution what had not been in the decree, *i. e.,* alternative damages; but that the inquiry ordered was obviously necessary in order to guide the Court in the exercise of its discretion under Act VIII. of 1859, s. 200, and that the order must be assumed to have been made for lawful purposes and with a view to such further order as might seem just.

Jackson, J.—I AM of opinion that there is no ground for the present appeal. The District Court of Nuddea gave a decree against the appellant for certain immoveable and moveable property specified in the schedule annexed to the plaint, or for the plaintiff's undivided share thereof, and made an order that the Civil Court Ameen was to ascertain the extent of the moveable property. The plaintiff having applied for execution, the Court made the further order that a purwanna be directed to the Civil Court Ameen to give possession to the decree-holder of such moveables specified in the decree as he could find, and further to inquire into the nature, amount, and value of such moveables as he could not find.

The contention is that in this way the Court proceeds to give in execution something which was not given by the decree, that is, to ascertain and order an amount of alternative damages to be paid to the decree-holder, which, if done at all, ought to have been done by the decree. It seems to me not necessary now to put any such construction on the order, nor is it necessary to consider whether the decree is drawn in the best form of which it is susceptible; but it appears to me at present that the decree is one which is capable of enforcement, and, for the enforcement of it, we must look to section 200 of the Civil Procedure Code. That section provides: "If the decree be for any specific "moveable, it shall be enforced by the seizure, "if practicable, of the specific moveable, and "the delivery thereof to the party to whom "it shall have been adjudged, or by imprison-"ment of the party against whom the decree "is made, or by attaching his property and "keeping the same under attachment until

"further order of the Court, or by both "imprisonment and attachment, if necessary." When the extent and value of a moveable property are not precisely ascertained before decree, it is obviously necessary, in order to guide the Court in exercise of the discretion it has under section 200, to ascertain what the value of the moveable not delivered to the plaintiff is, in order that the Court may make, if necessary, sufficient and not excessive order by way of imprisonment of the party, or by attachment of his property in case of non-delivery. We must assume that the order of the Court below was made for lawful purpose, and that the Court upon being informed by its officer will make such further order as to it may seem just.

The appeal is dismissed with costs.

Markby, J.—I am entirely of the same opinion.

Jackson and Markby, JJ.—As to the rule (No. 851), we think that the order of appointment of Receiver will not be discharged, but will continue in force until the District Court shall have made some further order in respect of the delivery of any moveable which may be found and taken out of the possession of the defendant, and that in respect of the rule each party do pay his own costs.

The 6th January 1873.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Decrees—Instalment-bond— Execution — Purchase of hypothecated Property—Right of Encumbrancers.

Case No. 116 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 15th September 1871, reversing a decision of the Moonsiff of Nowabad, dated the 13th May 1871.

Baboo Kamessur Pershad (Defendant), *Appellant,*

versus

Dowlut Ram (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Appellant.

Mr. C. Gregory and *Baboo Gopal Chunder Mookerjee* for Respondent.

R N executed, in 1864, a security-bond in favor of K L; in 1855, a second bond in favor of defendant; in 1866, a third bond in favor of K L; and, in 1869, a fourth bond in favor of defendant: all the bonds being registered and including, as security, the property in dispute. Both bond-holders took proceedings under Act XX. of 1866, s. 53, and obtained decrees. In 1868, K L arranged with R N to be paid by monthly instalments at interest higher than was allowed by the decrees. In 1869, he put up the property to sale in execution of his decrees, and it was purchased by plaintiff. Shortly after, it was again put up to sale in execution of defendant's decrees, and purchased by defendant, who got into possession. The present suit is to recover possession:

HELD that although K L in his execution-proceedings referred to his *kistbundee* as well as to his decrees, and irregularly included in the amount to be levied what was not given by the decrees, yet, as the proceeds did not cover the decrees, the proceedings could not be held to be void, nor the plaintiff's purchase a nullity:

HELD that what passed to plaintiff was the property hypothecated, of which he became owner and *primâ facie* entitled to possession, having purchased at the instance of a *first* encumbrancer; and that defendant's lien could not protect him in possession.

Markby, J.—THIS was a suit brought to recover possession of a share in certain lands. It appears that the property originally belonged to one Ram Narain, who executed a security-bond in favor of one Kesho Lall on the 31st July 1864. On the 25th July 1865, Ram Narain executed a second security-bond in favor of the defendant. On the 19th October 1866, a third security-bond in favor of Kesho Lall; and, on the 19th May 1867, a fourth security-bond in favor of the defendant. All these bonds were registered, and included, as security, the property now in dispute.

Both Kesho Lall and the defendant took proceedings upon their bonds, under section 53 of Act XX. of 1866, and obtained decrees for what was due to them respectively under the bonds.

On the 17th June 1868, Kesho Lall entered into an arrangement with his debtor Ram Narain, by which it was agreed that all that was then due to him under the decrees, that is to say, the sum of Rs. 9,194-1-3, should be paid by Ram Narain by monthly instalments with interest at the rate of 24 per cent. per annum. The decrees bore interest only at the rate of 12 per cent.

On the 29th January 1869, the property in suit was put up to sale at the instance of Kesho Lall in execution of his two decrees, and was purchased by the plaintiff. On the 15th February 1869, the property was again put up to sale at the instance of the defendant in execution of his two decrees, and was purchased by the defendant himself; and, under his purchase, the defendants got into possession.

Upon these facts, one point was made for the defendant, which, if decided in his favor,

would get rid of all difficulty. It was contended that the execution-proceedings under which the plaintiff purchased were void, inasmuch as they were based upon the kistbundee, and not upon the decrees. Now, it is true that Kesho Lall, when he instituted these execution-proceedings, referred to the kistbundee as well as to the decrees, and in the amount which he asked to levy he included interest at 24 per cent. as provided for by the kistbundee, and not at 12 per cent. as given by the decrees. This was made clear by the examination of the accounts which took place during the argument. But we do not think that this makes the execution-proceedings void so as to render the plaintiff's purchase a nullity. It was irregular, no doubt, and improper, to include anything in the amount to be levied except what was given by the decrees. But it is not asserted that the sale produced anything like the amount which was necessary to cover the decrees without any interest at all, and all that has, in fact, occurred is, that out of a sum of Rs. 9,599, which the execution-creditor sought to levy, a sum of Rs. 162 was not due under the decrees, but under the kistbundee. We think we ought not, under these circumstances, to say that the plaintiff's purchase is a nullity.

We must, therefore, consider what are the rights of the parties upon these complicated transactions. The case made by the plaintiff is shortly this: He says that he purchased at any rate what are called the "rights and interests" of Ram Narain, and that whatever may be the rights of Kesho Lall (if he has any), or of the defendant under their security-bonds, he has a right to hold the property under his purchase against the defendant, who, under his decrees which were only *in personam* against Ram Narain, could sell only the property of Ram Narain; whereas, at the date of the sale at which the defendant purchased, Ram Narain had no right or interest in this property whatsoever.

The defendant's case is that the plaintiff purchased only the rights and interests of Ram Narain subject to the two mortgages, of which the plaintiff had notice at the time of sale, and that the plaintiff cannot turn the defendant out without paying off the debt due to the defendant.

Neither of these statements are very clear; and it is obvious that this case cannot be decided without ascertaining somewhat more exactly what interest in the property passed to the plaintiff by the execution-sale.

It seems to us that what passed to the plaintiff by the execution-sale was the property hypothecated, whether subject to any rights on the part of the debtor need not at this moment be considered. It is said that only the equity of redemption passed to the plaintiff. But there is in reality in this case no such thing as an equity of redemption distinct from the property itself. The notice of an equity of redemption as a mere right distinct from the estate has, in fact, very little foundation in law. It is an universal rule that the borrower remains the owner of the property hypothecated until the ownership is transferred by some formal proceeding, generally a proceeding in a Court of law. And notwithstanding the peculiar character of what is called an "equity of redemption" on an English mortgage, the same doctrine has been there applied; it being held that looking to the substance, and not to the form of things, the mortgagor is the real owner of the property notwithstanding the mortgage, *and possessed of it in his ancient and original right.* (See Coote on Mortgages, 3rd edition, page 23.)

There is no doubt, moreover, that the holder of security-bond selling even on a common money-decree sells the property clear of his own lien. That has been held in numerous cases, and is in accordance with general principles.

The plaintiff, therefore, upon the execution-sale, became the owner of the property, and was *primâ facie* entitled to the possession.

Prior to the execution-sale, the property had, however, been twice pledged to the defendant, and we have to consider whether by reason of this, coupled with the subsequent proceedings in execution by which the defendant got into possession, the plaintiff has lost his right to recover immediate possession of the property.

Now, there is one authority which goes so far as to lay down that, by the sale in execution at the instance of Kesho Lall on his money-decree, the property passed to the plaintiff clear of both the incumbrances in favor of the defendant. That decision is to be found in 7 Weekly Reporter 232. The circumstances of that case were very similar to the present. There was a first and second hypothecation, the plaintiff's being the second. Both creditors had, in their turn, obtained money-decrees, and the defendant had purchased in execution under the first decree. So far the defendant in that case stood in exactly the same position as

e plaintiff in this. In the case in 7 Weekly Reporter, however, the defendant t into possession, and the second decree-lder never proceeded to a sale, but brought suit to enforce his lien. He succeeded in e lower Courts, but this Court (Bayley d Pundit, JJ.) reversed their decisions, and smissed the suit with costs. They held at all the rights, both of the borrower and the pledgee in the property, *as hypothe-ted when the first hypothecation was made,* ssed to the auction-purchaser; in effect lding that by the execution-sale, even ough on a money-decree, the other hypo-ecation was extinguished.

This decision would at once dispose of e present case in favor of the plaintiff, d as it was evidently very carefully con-dered, it is of course entitled to very great eight. Nor are we aware that it has ever een directly questioned. An application as made for a review after Mr. Justice mbhoonath Pundit's death, and it was fused; but the authority of the original cision in question is not thereby weakened affirmed.

It is not, however, necessary for us to go the full length of this decision in order dispose of the present case. The ques-on which we have to decide is not what e the ultimate rights of the parties, t who, in the present state of things, is titled to possession; and upon the best nsideration which we have been able to ve to this case, we think the plaintiff is titled. He purchased the property at a le in execution, and as between rival ction-purchasers, the first purchaser must ve priority. But then the defendant relies on his lien. We do not think he can so otect himself. The right usually consider-d to be given by a second hypothecation a right to pay off the first encumbrancer, d to stand in his shoes; and if the deci-on in the 7 Weekly Reporter cannot be pported to the full extent, and the defend-t has still this right or some modification f it, or some other right of that kind, per-ps he can bring a suit to establish it, or e might possibly by proper management ve had his right adjudicated upon in this it. But we do not think that either by mply relying on the sale in execution or on his hypothecation, or upon both com-ned, he can retain possession against the aintiff. The situation of the two parties w claiming possession, however similar in er respects, differs in this most essential particular—that whereas the plaintiff has purchased at a sale at the instance of a *first* encumbrancer, the defendant has purchased only at a sale at the instance of the *second;* from which, as we understand the law, it results that the plaintiff has purchased the property, and the defendant, if he has pur-chased anything, has only purchased an assignment of his own lien.

We think, therefore, that the plaintiff as purchaser has a present right of possession, and that the defendant has not in the present suit established any right under his encum-brance by which the plaintiff's immediate right to take possession is obstructed.

The result is that the special appeal is dismissed with costs.

The 15th January 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Secondary Evidence—Purchaser of Decree—Cross-decree.

Case No. 245 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 27th June 1872, reversing a decision of the Subordinate Judge of that District, dated the 3rd December 1870.

Oopendro Mohun Moostafee (Judgment-debtor), *Appellant,*

versus

Poorno Chunder Bhuttacharjee (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Baboos Ashootosh Dhur* and *Bhyrub Chunder Banerjee* for Appellant.

Baboo Sreenath Doss for Respondent.

An attested copy of a petition was admitted as evi-dence where the original was with the record of a different case, and application had been made to the Court to send for such record.

The purchaser of the rights and interests of a decree-holder takes the decree subject to the right of the judg-ment-debtor to set off his cross-decree.

Kemp, J.—In this case, the parties before the Court are Oopendro Mohun Moostafee, the special appellant, who obtained a decree against the Bengal Indigo Company on the 8th of December 1866, and the respondent Poorno Chunder Bhuttacharjee, who was the purchaser from the Bengal Indigo Company

of a decree which they obtained in March 1857 against Oopendro, the appellant, and others. The decree obtained by Oopendro was against the Bengal Indigo Company and other parties, but the liability of the Bengal Indigo Company was declared by that decree to be some Rs. 6,880. It does not appear that that sum was to bear interest. The Bengal Indigo Company, as already observed, had obtained a decree against Oopendro, the appellant before us, and others, for rents paid by them to protect a putnee, and the amount of that decree, as far as we have been shown by the pleaders, was principal Rs. 2,976-3-6, costs Rs. 554-7-6, total Rs. 3,530-10-6. That sum was to bear interest. On the first application to execute this decree, the Subordinate Judge of Nuddea refused to allow the set-off, but, in October 1861, the then Judge of Zillah Nuddea, Mr. Justice L. S. Jackson, held that the set-off could be allowed, and that the Subordinate Judge was wrong in not allowing it, but that inasmuch as the question of wassilat, for which the defendants, the Bengal Indigo Company, were liable under the decree obtained by Oopendro, had not yet been ascertained, he passed an order allowing the set-off, and directed that the execution of the decree of the Bengal Indigo Company was to be stayed until the amount of wassilat could be ascertained. Subsequently, or on the 7th of January 1870, the Bengal Indigo Company applied again to execute their decree against Oopendro, stating that the amount due to them under their decree by Oopendro was Rs. 8,690, and the amount due by them to Oopendro Rs. 7,390, and they prayed for execution for the difference, or Rs. 1,300. Very shortly after that, the Bengal Indigo Company applied, stating, that they were wrong in stating the amount due by them to Oopendro in their former petition; that only Rs. 1,704 were due, and they asked for execution to the amount of Rs. 6,986. On that application, on the 10th of January 1870, an order was made directing the Amlah of the Court to make up an account as between the two decree-holders, namely, Oopendro and the Bengal Indigo Company. It is, therefore, clear from the former proceedings in the case that the set-off was allowed by the then Judge of Nuddea; and the Bengal Indigo Company, whose decree has been purchased by the special respondent, admitted that Oopendro was entitled to a set-off; and in asking for execution of their decree as against Oopendro they prayed that the amount due under Oopendro's decree m be set off against their decree.

Whilst the matter was in this s and before the Amlah filed any account tween Oopendro and the Bengal Indigo C pany, the Bengal Indigo Company transfe their rights in the decree to the respond Poorno Chunder Bhuttacharjee, for the s sum of Rs. 600. We are informed this Poorno Chunder Bhuttacharjee, w mookhtar of the Bengal Indigo Comp but be this as it may, Oopendro shortly a petitioned the Court, stating that this tr fer was a benamee transaction, but orders were passed upon this application not appear.

Oopendro, in 1869, transferred his ri under the decree against the Bengal In Company to one Ramdhun Chutlun Subsequent to the transfer, he applie the Court to substitute the name of his dee Ramdhun Chutlungee in his place, he prayed the Court to pay to the said R dhun Chutlungee a sum of Rs. 7, which had been deposited by the judgm debtor, and he also prayed the Court to mit his vendee to carry on the decre against his judgment-debtors, and to rec the amount due against them. We h been shown the authenticated copy of a p tion filed by Ramdhun Chutlungee in Court below, in which Ramdhun Chutlun admitted that he had purchased Oopend decree, but that Oopendro was entitle the set-off against the Bengal Indigo C pany and not his vendee, the petitioner, R dhun Chutlungee.

The pleader for the respondent objec to the admission of this petition on ground that it was not on the record; but pleader for the appellant, Mr. R. T. Allan, shown us that he applied to Mr. Just L. S. Jackson to send for the record of the c in which the original of this petition wa be found; and the copy of the petition be an attested copy, we think, looking to fact that an application was made to Court to send for the original, that we ou to admit it; and therefore admitting it, appears to us clear that Ramdhun Chutlung the purchaser of the rights and interest Oopendro, has clearly admitted that he d not purchase Oopendro's right to set off sum that might be due to him under decree against the Bengal Indigo Compa We also find that Poorno Chunder Bhu charjee, the purchaser from the Beng Indigo Company, had full notice of Oope dro's claim to set off his decree against th

is vendors, the Bengal Indigo Company, this possibly accounts for the small sum h Poorno Chunder has paid for the ee purchased by him from the Bengal go Company. The judgment of the Bench to be found in Volume I., Bengal Reports,* is very clear on this point. late Chief Justice, Sir Barnes Peacock, rved that the case was almost too clear argument, the case put to him being ether the purchaser of a decree takes decree subject to the right of the judg-t-debtor to set off his cross-decree." Full Bench decided that the purchaser rights and interests of the decree-holder entitled to execute the decree purchased e manner and to the same extent as the nal decree-holder might have done, and otherwise or further; and consequently the purchaser takes the decree subject to right of the judgment-debtor to set off cross-decree. It has been alleged that ase Oopendro has sold the whole of his ts and interests under the decree, therefore as not entitled to claim the set-off, inas-h as if he is allowed to claim a set-off, he s a double advantage, as the Judge says; gets Rs. 10,000 for his rights and in-ts under the decree, and also the right to off; but in this case it is clear from the n of the vendee, Ramdhun Chutlungee, the understanding between the parties that Oopendro in transferring his decree amdhun did not pass the right of set-off er that conveyance. This appears clear the action of the vendee of Oopendro, e petition has been referred to.

e, therefore, are of opinion that the judg-t of the first Court is a right judgment, the set-off, which was allowed by Mr. ice L. S. Jackson in 1861, was only put nd not then carried into effect on account e wassilat not having been ascertained. st now be allowed, and the decision of Judge of Nuddea reversed.

e, therefore, decree the appeal with s payable by the respondent.

The 16th January 1873.

Present:

Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Mesne-profits—Interest—Damages.

* 10 W. R., F. B., 32.

Case No. 35 of 1872.

Regular Appeal from a decision passed by the Officiating Judge of Patna, dated the 12th October 1871.

Chowdhry Wahed Ali (Defendant), *Appellant*,

versus

Mussamut Jumaye (Plaintiff), *Respondent*.

Moonshee Mahomed Yusuf for Appellant.

Mr. C. Gregory for Respondent.

Where the accounts of an estate are made up at the end of the ordinary year, mesne-profits are rightly treated as due at the end of such year, and interest may be added by way of damages.

Couch, C.J.—We think the Judge of the Court below was right in treating the mesne-profits as due between these parties at the end of the ordinary year, when the accounts of the profits of the estate would be made up, and it would be ascertained what was the sum for which the person who had wrongfully received the rents of the estate would be liable to account. There is nothing in the case to show that the Judge has come to a wrong conclusion on that part of the case.

Then, with regard to the interest, the latter authorities in this Court lay down that interest may be added to the amount of the mesne-profits by way of damages, because really the plaintiffs sustain damage not merely by being deprived of the mesne-profits of the year, but by being deprived of the use of the money until it is recovered by suit. In this case, there seems to be no reason why the defendant should be exempted from that rule.

The appeal must be dismissed with costs.

The 16th January 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Admission of evidence—Error in Law.

Case No. 139 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 21st September 1871, reversing a decision of the Moonsiff of that District, dated the 30th June 1871.

Serajool Huq and another (Plaintiffs), *Appellants,*

versus

Shaikh Keramutoollah and another (Defendants), *Respondents.*

Mr. Branson and *Baboo Grish Chunder Ghose* for Appellants.

Moonshee Mahomed Yusuf for Respondents.

In a suit for ejectment on the ground that defendant was holding over after the expiration of his lease, defendant's vakeel deposed on oath in the first Court that defendant had no documents whatever, and that those he once had were burnt. When the case came before the Subordinate Judge in appeal, he permitted the defendant to file a new piece of evidence, *viz.*, a pottah, which was alleged to have escaped the general destruction:

HELD that the admission of the pottah, on the mere *ipse dixit* of the defendant, was a substantial error in law, even though plaintiff neither admitted nor denied the document; that the Subordinate Judge had no right to admit the pottah under the circumstances; and that, if he had, he was wrong in deciding the case upon it without taking evidence as to its genuineness.

Glover, J.—WE think that the Subordinate Judge's decision in this case is erroneous and must be reversed. There were two suits brought by the plaintiffs against the defendants, with only one of which, however, we have to do in special appeal. That was a suit for ejectment on the ground that the defendant was holding over after the expiration of his lease. The first Court found that the defendant had no right of occupancy, and that the plaintiffs had the right to eject him, and gave the plaintiffs a decree accordingly.

When the case came before the Subordinate Judge in appeal, the defendants put in a petition to the effect that the examination of their vakeel in the first Court, in which he had stated that they had no documents in support of their claim to hold as occupant ryots, was not exactly correct, and that they had one document, namely, a pottah, which had escaped the general destruction of their papers by fire, and which they asked the leave of the Court to file. The Subordinate Judge gave them leave to do so, and proceeded to decide the case mainly, no doubt, upon this new piece of evidence, which had been produced by the defendants. There was a special appeal made to this Court, the result of which was that the Subordinate Judge's proceedings were stayed, and he was directed to submit, in accordance with the provisions of section 355 of the Code of Civil Procedure, his reasons for admitting that pottah at the appeal-stage of the case. The Subordinate Judge has since sent a certificate in which he records his reasons for so doi These reasons are that the defendant ca to him with a petition of appeal, and sta that all his documents had not been d troyed by fire as stated by his vakeel in first Court, and that as the pottah appea to be a relevant document, and as the spondent, the plaintiff, did not either ad or deny it, he thought it right to admit it evidence without any further proof of genuineness; and, on this evidence, he dec ed the case in favor of the defendant, in much as the pottah, in the view which Subordinate Judge took of it, satisfacto proved that the defendant had a right occupancy. It seems to us that the Subo nate Judge was not justified in admitt this pottah. Setting aside the fact that defendant's vakeel had deposed on oath the first Court (and we must suppose he then acted under instructions from clients), that the defendants had no do ments whatever, and that those they o had in their possession had been burnt, seems to have taken the defendant's m *ipse dixit* as to this pottah, without dema ing from him either his own deposition oath or any evidence whatever in proof its genuineness.

The statement in the petition of appeal, which the defendants chose to say that particular document had been saved from general destruction of all their papers, ou to have been supported by evidence, for i extremely difficult to understand how, if document was in the defendants' possess when the case was before the first Court, they now say, they did not produce it thro their vakeel, as the pottah, if establish would have been a complete defence to plaintiff's suit for ejectment. Section 355 the Code of Civil Procedure says: "I "appear that the lower Court refused "admit competent evidence, or if the Appell "Court require any exhibits to be produ "or witnesses examined, to enable it "pronounce a satisfactory judgment, or "any other substantial cause, the Appell "Court may allow additional exhibits to "received." Now, the only clause of section under which the present case c possibly come is the last, namely, "substan cause;" for it is quite clear that the lo Court did not refuse to admit any compet evidence inasmuch as this particular pi of evidence admitted in the Appellate Co was never produced before it; and it is equa clear that the Lower Appellate Court not require any additional exhibits to be p

duced or witnesses to be examined; for if it had not been for the defendants' coming forward with this special prayer in their petition of appeal, the Subordinate Judge would have disposed of the case on the record as received from the Moonsiff. Now, what was the "substantial cause" for admitting this pottah? It appears to us that there was no such cause. In the first place, it was admitted without any test of the truth of the defendants' statement; without any explanation being required as to how the document escaped from the fire; and without any proof of its genuineness, for no witnesses were offered, and the defendants themselves did not substantiate it by their own oaths. The Subordinate Judge says that he admitted it, because the plaintiff did not deny it. This is a most extraordinary way of admitting evidence. Here is a document of which the plaintiff knew nothing, which was produced in the appeal-stage, when, for aught we know, the plaintiff was not represented; and because he did not deny a document which there is no reason to suppose that he had ever heard of, the omission on his part is taken as proof of the pottah's genuineness. Then it is said that under any circumstances, supposing the Subordinate Judge to have been wrong in admitting the pottah in evidence, and disposing of the case upon it, unproved as it was, still the fact of his finding against the dowl mundo bast kubooleut of the plaintiff is sufficient to make us dismiss this special appeal. On this it is sufficient to observe that the objection was not taken in the Lower Appellate Court. The defendants did not rely upon the plaintiff's failure to prove the dowl kubooleut, but rested their appeal before the Subordinate Judge entirely on their being able to prove on their own account by means of their pottah that they were entitled to a right of occupancy.

It appears to us that the Subordinate Judge, by his improper admission of evidence, has committed a substantial error in law, which undoubtedly has had the greatest possible effect upon the result of his decision upon the merits. We think that he had no right, under the circumstances stated by him, to admit the pottah; and that, if he had the right, he was wrong in deciding the case upon it without taking evidence as to its genuineness. We, therefore, reverse his decision; but as the first Court found that the defendants were not entitled to a right of occupancy, we think that the defendants have a right to have the opinion of an Appellate Court upon the evidence adduced by them in the first instance. We do not restore the decision of the first Court, but remit the case to be tried on its merits, removing it under the circumstances from the file of the Subordinate Judge to that of the Judge of the District, who will try this appeal on the record as sent up by the first Court, eliminating from his consideration the pottah, which has been improperly admitted.

The 16th January 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Re-formations—Rights of Proprietor.

Case No. 468 of 1872.

Special Appeal from a decision passed by the Judge of Dacca, dated the 13th December 1871, reversing a decision of the Officiating Subordinate Judge of that District, dated the 25th February 1871.

Jugobundhoo Bose (Defendant), *Appellant, versus*

Koomoodinee Kant Banerjee Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Kalee Mohun Doss and *Chunder Madhub Ghose* for Appellant.

Baboos Romesh Chunder Mitter and *Doorga Mohun Doss* for Respondents.

The purchaser of an estate found by actual measurement the year before to consist of a certain number of beeghas with a specified rental, can have no claim to re-formations of land belonging to the mehal as it originally stood.

Glover, J.—The parties to this suit are purchasers of adjoining Government khas mehals, and the land in dispute is "chur," which plaintiff claims as an accretion to his mehal Chundra Bushara, but which the defendant alleges to be partly a re-formation on its original site of his mouzah Kotibaree and partly accretions to that re-formation. This is the way, at all events, in which the case was presented in the Courts below. Before us the defendant, who is the special appellant, has added to his case by maintaining that a small portion of his purchased land was found by the Ameen to be on the northern side of the *sota*, and that part at least of the newly-formed chur accreted to it.

The Subordinate Judge dismissed the plaintiff's suit, holding that he had neither

had obtained a decree in the High Court, establishing his share to be a 5 annas 6 gundas 2 cowries 2 krants share, therefore the ryot was bound to pay to Golam Mahomed Shaha rent in proportion only to a one-third share, and that he ought to have deposited the balance of the rent due in the Collectorate. The Moonsiff, therefore, referred the ryot to a suit as against Golam Mahomed Shaha for a refund of any excess of rent paid by him, and held that the ryot could not be absolved from the payment of rent in proportion to a one-third share to the plaintiff, and that the plaintiff was, therefore, entitled to a modified decree, which was passed accordingly in his favor.

In appeal, the Judge was of opinion that the decision of the Moonsiff was a just and equitable one; that the very fact of the suit brought by Golam Mahomed Shaha against the present plaintiff shows that the plaintiff was in possession of his purchase; and that as he has, by the decree of the High Court, succeeded to the rights of the person he purchased from, it followed as a matter of course that it was absurd to say that the relationship of landlord and tenant did not exist. The Judge was further of opinion that the proceedings of Golam Mahomed Shaha were throughout litigious and improper, and in palpable collusion with the ryot-defendant. The appeal was, therefore, dismissed with costs.

On the cross-appeal preferred by the plaintiff—that is to say, against that portion of the decision of the Moonsiff which refused to give him the full amount of the jumma claimed by him—the Judge found that, as the plaintiff had no proof whatever of previous rent having been received by him at any time, and as no weight could be placed on the jumma-wassil-bakee papers drawn up by the plaintiff, the cross-appeal was also dismissed.

A preliminary objection has been taken to the hearing of this appeal, on the ground that, inasmuch as the rent in suit was under Rs. 100, no appeal would lie, and section 102 of Act VIII. of 1859 has been quoted in support of this argument. We are of opinion that this preliminary objection must be overruled. There can be no doubt that there was a question raised as to the amount of the jumma. The plaintiff attempted to vary the jumma hitherto paid by the ryot; the ryot resisted that attempt, and the amount of the jumma was the subject of a decision which was given in favor of the ryot. An appeal will, therefore, lie under the pr sions of section 102.

We now come to the grounds of ap taken by the defendant Golam Mahoi Shaha.

The *1st* ground taken is that the C below has wholly misunderstood the n of the previous civil suit, which did not a show that the plaintiff was in possession, the contrary.

2nd.—That the Court below have misc strued the decree of the High Court, w did not declare or establish any right of plaintiff or his vendor.

3rd.—That the Court below has fo that the plaintiff "had no proof of prev rent paid;" on the other hand, the proceedi in the previous civil suit and Act X. in 1866 and the evidence in the case cle show that your petitioners were in posse and receipt of rent in respect of the w property from 1262. The Court be ought to have dismissed this suit, which clearly an attempt by a side wind to re a title which has become extinguished effluxion of time, long before the instit of the present suit.

4th.—That there being no proof of vious receipt of rent or attornment by tenant-defendant, the Court below ought have dismissed the plaintiff's suit for r and is wrong in holding that the relatio landlord and tenant existed.

It appears that the estate Zumun Tetoo was the property of three brothers, Ju nath, Seetanath, and Sreenath, jointly. present plaintiff is the manager appointed the Civil Court representing the estate Sreenath, who, we are told, is a lun Zumun Tetooleah was originally resu by Government and settled with Judoo alone. In execution of a decree ag Judoonath, one of the three brothers, rights and interest in the aforesaid mo were purchased by the defendant Go Mahomed Shaha in August 1855, or Sra 1262. This fact is not disputed, and purchase, therefore, dates 16 years before present suit. The plaintiff purchased execution of a decree in a suit against Ju nath and Kunuck Monee, and his purc is dated some 11 years subsequent to purchase of Golam Mahomed Shaha. execution of that decree, an attempt made to attack the whole mouzah of Zu Tetooleah as the property of Judoo and Kunuck Monee alone. Golam Maho Shaha intervened under section 167. intervention was, however, rejected on

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of December 1865, apparently on the nd that the claim was a stale one. m Mahomed Shaha then instituted a lar suit to have his title established, ing that, from the date of his purchase, ad been in sole possession of the whole zah of Zumun Tetooleah; and in that suit btained a declaratory decree to the effect he was entitled to a one-third share in mouzah, it being held that his possession he time when he brought the suit had hen ripened into a title by an adverse ession of 12 years. The plaintiff subently brought a suit against this very nt for rent, which was dismissed. In , when the present suit was brought, m Mahomed Shaha, the defendant, ms to have been in possession for a period 5 or 16 years of the whole mouzah of un Tetooleah. The plaintiff, instead of ging a suit for possession as against Golam omed Shaha, has brought a suit for rent nst the ryot-defendant, who has, from , been continuously paying the rent to m Mahomed Shaha—the suit being thus ght clearly with the view of bringing in m Mahomed Shaha, and to have tried, er color of a rent-suit, a question of between the plaintiff and Golam Mahod Shaha.

a case referred to by the pleader for the ellant, to be found in Volume XVI., kly Reporter, page 237, it has been held such a proceeding is altogether opposed e principle laid down in section 7, Act II. of 1859. The Court below appears to e entirely misunderstood the nature of previous litigation between Golam Maho- Shaha and the present plaintiff. It has r been decided by any Court that the tiff was in possession at any time of any in this mouzah Zumun Tetooleah. On contrary, it is clear that, in the suit ght by Golam Mahomed Shaha, it was d that he had been in possession from 5 up to the date of that suit, or for nearly years at the time that suit was brought. as also been found by the Court below the plaintiff has never at any time receiv- rent from the defendant, the ryot. This , therefore, appears to us to be clearly a e coming strictly within the purview of decision in Volume XVI. The plaintiff, ead of bringing his suit for possession as inst Golam Mahomed Shaha—in which he would probably have been met by a in bar—has attempted to bring a suit rent in order to raise the question of title between him and Golam Mahomed.

Holding, therefore, that the lower Courts have taken a wrong view altogether of the decision of this Court with reference to the previous litigation, we reverse the decision of the Judge, and dismiss the suit of the plaintiff with costs.

With reference to the appeal of the ryot-defendant, the grounds raised in that appeal, not having been raised below, cannot, under the ruling in Volume XVIII., Weekly Reporter, page 376, be entertained now; but, on the grounds of our decision in the appeal of Golam Mahomed Shaha, which must govern this case also, the suit of the plaintiff as against the ryot must be dismissed.

The 21st January 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Enhancement—Mokurruree Lease—Tender—Special Appeal.

Case No. 703 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd January 1872, reversing a decision of the Moonsiff of Oundah, dated the 30th September 1871.

Dwarkanath Sircar (Plaintiff), *Appellant*,

versus

Gunga Narain Shalooye and another (Defendants), *Respondents*.

Baboo Anund Chunder Ghossal for Appellant.

Baboo Rash Beharee Ghose for Respondents.

Where a suit for enhanced rent had been decided against plaintiff upon the question whether there was a mokurruree or not, it was held that the plaintiff could not afterwards in special appeal take advantage of the regular proof of tender and have the suit dismissed, seeing that no issue had been raised as to such tender.

Couch, C.J.—As to there being no proof of a tender, the answer appears to us to be that no issue was raised about it. The plaintiff evidently put that part of the case aside, and had the suit tried upon the question whether there was a mokurruree or not, which has been found against him. He cannot now take advantage of the want of regular proof of tender; and there certainly is no reason why (the defendant having admitted that rent was due at the rate of Rs. 61, and having offered to pay it) the plaintiff

should have this suit dismissed entirely and be obliged to bring a fresh suit to compel the defendant to pay that money. It would be a perfect waste of litigation if we were to deal with this case in a way which would render that necessary.

The decree appealed from must be amended by awarding to the plaintiff rent at the rate of Rs. 61 admitted by the defendant, but without interest and without any costs. The plaintiff has clearly failed in the suit, and now only recovers what the defendant was willing to pay.

The 21st January 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Act XIV. of 1859, s. 1, cl. 12.

Case No. 689 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 20th December 1871, affirming a decision of the Subordinate Judge of that District, dated the 1st December 1870.

Durshun Lall Sahoo and others (Plaintiffs), *Appellants,*

versus

Asmutoonnissa and others (Defendants), *Respondents.*

Baboo Ram Chunder Mitter for Appellants.

Mr. C. Gregory for Respondents.

The date on which the cause of action arose is to be excluded in computing the period of limitation.

Kemp, J.—THE ground taken in this appeal is "that the Judge was wrong in law in "holding that the suit was barred, inasmuch "as the date on which the cause of action "arose should have been excluded in com-"puting the period of limitation."

The suit is to recover possession of a two-anna share of mouzah Koosmota, and to set aside a deed of conveyance, dated the 5th April 1858, executed by the mother of the plaintiff during his minority. The suit was instituted on the 5th April 1870.

Section 1, clause 12, Act XIV. of 1859, governs this case, and the period is twelve years from the time the cause of action arose.

The earlier cases which have been quoted during the argument were instituted before Act XIV. of 1859 came into operation. Th more recent cases may, we think, be state as favoring the view that the day on whic the cause of action arose is to be exclude in computing the period of limitation. I this view, the special appellant's suit is i time. We reverse the decision of the Judg and send back the case for trial on th merits.

The 21st January 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glove *Judges.*

Malikana—Limitation—Act XIV. of 1859, s. 1, cl. 12.

Case No. 757 of 1872.

Special Appeal from a decision passed b the Judge of Mymensingh, dated th 24th January 1873, reversing a decisio of the Moonsiff of Madargunge, dat the 27th September 1871.

Gobind Chunder Roy Chowdhry (Plaintiff *Appellant.*

versus

Ram Chunder Chowdhry (Defendant), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant,

Baboos Unnoda Pershad Banerjee, Rome Chunder Mitter, and *Kally Mohun De* for Respondent.

Malikana is an interest in land coming under Act XIV of 1859, s. 1, cl. 12, and the right to recover it ceases wh it is left as an unclaimed deposit in the Collector's ha for 12 years.

Glover, J.—IT does not appear to me ne cessary to go into the objection raised by th special respondent's pleader, that the Judg decided against the plaintiff's title to th chur, as well as against the claim to malik na. I do not, moreover, see how he coul have decided any such question, or wh necessity there was for his doing so, seein that he had previously declared the right t recover the malikana barred by limitatio The point, however, is not material, and th only question we need determine is whether th plaintiff (special appellant) has lost his righ to recover malikana by reason of his no having claimed it for more than 12 years.

The special appellant contends that his e of action arose on the 19th of August , the date on which the defendant took money from the Collector's treasury; this can hardly be. His right to receive ikana on account of the accreted chur s began on the date of the purchase by father of the 6 gundas 3 cowries 1 t share of the zemindaree in 1256 and 8 B. S., for there was malikana due to proprietors, as appears from the record, rly as the year 1253 B. S. It may be , so long as the money remained in the ector's hands, the plaintiff suffered no in- , but it has been definitively ruled, not only his Court, but by the Privy Council, that rty entitled to an interest in immoveable erty loses, not only his remedy, but his by being out of possession for more 12 years; and it has been likewise held his Court in several cases that malikana is terest in land coming under clause 12, on 1, Act XIV. of 1859, and that, where e has been no enjoyment of it for a period of ears, the right to recover ceases (Hiranund oo *vs.* Mussamut Ozeerun, 9 Weekly Re- er 102; Budurul Huq *vs.* The Court of ds, 10 Weekly Reporter 302; Bebee mmun *vs.* Mussamut Om Koolsoom, 13 kly Reporter 465; Bhoolee Singh *vs.* noo Bohoo, 12 Weekly Reporter 46 and , the last being the judgment of the eal Bench).

Now, at the date of the purchase by plaint- s father, there was malikana in deposit the Collector on behalf of the proprietors o had refused settlement, and from that the purchaser was entitled to and could e received it. More than 12 years have sed since that date, and I do not see how, e face of the decisions above quoted, we do otherwise than say that the plaintiff , by his own neglect to sue, lost his title alikana.

As to the Subordinate Judge's finding that 30 years' limitation applies to the case, Collector being in the position of a sitory (section 5, Act XIV. of 1859), I do think it correct. The suit is not brought inst the Collector, but against a third y who has wrongfully taken from the ury money said to be the plaintiff's. e Collector had refused to pay the plaint- his malikana, a suit to compel payment ht have been brought under section 5 e Government *vs.* Rhoop Narain Singh, Weekly Reporter 162); but in this case uestion of deposit arises, so far as limit- n purposes are concerned.

I think we ought to dismiss this special appeal with costs.

Kemp, J.—I concur in dismissing this appeal. On the face of the plaint, the suit is barred, for the plaintiff sues for the establishment of his title in the churs which have accreted to the parent zemindaree to the extent of the share purchased by him of the zemindaree, and consequently to participate in the malikana payable to the recusant proprietors. From date of the plaintiff's purchases, the suit is manifestly beyond time.

The title of the plaintiff being barred, any claim to malikana, which is based on that title, is also barred. The malikana, which is an interest in land, has been enjoyed by the defendant adversely to the plaintiff for more than 12 years prior to suit.

The 22nd January 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Right of Occupancy—Sub-letting—Adverse Title.

Case No. 621 of 1871.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 24th February 1872, modifying a decision of the Moonsiff of Oolooberiah, dated the 31st July 1871.

Unnopoorna Dossee (Plaintiff), *Appellant*,

versus

Radha Mohun Pattro and others (Defendants), *Respondents*.

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Doorga Mohun Doss for Respondents.

A right of occupancy cannot be acquired by sub-letting from a person who has himself only a right of occupancy.

Quære.—Under what circumstances may a person, having a right of occupancy, forfeit it by setting up an adverse title?

Couch, C.J.—In this case, the plaintiff sued for khas possession of the land which was the subject of the suit, alleging that the person to whom he had let it had been disturbed. The defendants set up an adverse title claiming the land as their own. The title so set up has been found against them. It is now contended that there is a right of occupancy in the land, and that, therefore, the

plaintiff ought not to have a decree for possession.

In order that the defendants may avail themselves of this objection before coming to the question whether, by setting up an adverse title, they have forfeited any right of occupancy which they might have, it must appear that they have a right. Now, it is not found that they have such a right, but it is sought to be inferred from the fact that there has been an occupation of the land for more than 40 years. That appears to have been under Kedar Moostafee.

According to the decision of this Court in 15 Weekly Reporter, page 469, if Kedar Moostafee was himself only a person having a right of occupancy, the defendants could not acquire a right of occupancy by any sub-letting from him. That is expressly enacted by section 6 of Act X. of 1859. Therefore, it is necessary for the defendants to show that he was a person who might sub-let, and give them such a possession as would confer a right of occupancy. That is left quite undetermined. There is nothing to show us that he was anything else than a person having a right of occupancy who could not sub-let. There is no admission by the plaintiff in the plaint that he was anything else. It simply states that the defendants had been occupying for a certain number of years under him. Therefore, the defendants fail to make out that which might entitle them to say that the plaintiff could not have a decree for possession notwithstanding the adverse title set up by them has not been proved.

I think the decision appealed from is wrong in giving effect to such a right of occupancy. It is not necessary to determine the other question—under what circumstances a person having a right of occupancy may, by setting up an adverse title, forfeit it. If the question should ever arise, I should like to consider whether the case in the 2nd Weekly Reporter, page 2, Act X. Rulings, is one which should be followed under all circumstances

The decree appealed from must be reversed with costs.

Glover, J.—I concur in reversing the order of the Court below.

The 23rd January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Joint Decree—Liability of defaulting Defendant.

Case No. 266 of 1872.

Miscellaneous Appeal from an order pass by the First Subordinate Judge of Bhag gulpore, dated the 22nd July 1872.

Khajah Mahomed Isah Khan (one of the Judgment-debtors), *Appellant,*

versus

Mothoora Doss (Decree-holder), *Responde*

Baboo Bhyrub Chunder Banerjee for Appellant.

Baboo Debendro Narain Bose and *Moonshee Abdool Baree* for Respondent.

In a suit for possession where the plaint clearly ch ed a certain defendant (K) with others as having jo ousted plaintiff from the property, and defendant did choose to deny the ouster, or to appear in the su even when made a respondent in appeal, and the resulted in a decree for possession with mesne-pro

HELD that K's subsequent plea that he had not b in possession could not be listened to, and that he liable under the decree.

Kemp, J.—IN this case the plaintiff spondent, Mothoora Doss, sued to recover p session of a 3½-anna share in 83 mouz with mesne-profits. There were 13 or defendants in the original case, and amon them the present special appellant, Kha Mahomed Isah Khan. The plaintiff's was dismissed by the first Court on the 1 of August 1862. On appeal to this Co the plaintiff obtained a modified decree the 31st of August 1863. The decree this Court was to this effect, that it clear that Khajah Russool Khan had a sh in the estate in dispute; but that there no precise data upon which to ascertain exact extent of that share, and that, theref as represented by the vakeels on both si it was assumed by the Court to be 15 d 18 cowries 3 bowries 12 fowries, and decree was given to the plaintiff for posse sion of that share with mesne-profits.

The decree-holder has now applied f execution of the decree for mesne-profits against the appellant, and the Subordin Judge has found that the appellant is liab It appears that the appellant, Khajah Mah med Isah Khan, was a defendant in the f Court, and that the plaint stated that plaintiff was ousted by the defendant Kha Mahomed Isah Khan and others jointly. T defendant did not choose to appear in the and his present plea that he was not in p session cannot be listened to, inasmuch he had an opportunity of proving that pl and he neglected to do so. He was al

ade a respondent in this Court, and did not pear. The parties who did appear all ned in a common defence to the effect that hajah Russool Khan possessed no right d interest whatever in the 83 mouzahs. e grounds now taken in appeal are :—

1st.—That the judgment-debtor is not ble at all.

2nd.—That, inasmuch as the decree-holder s released two of the defendants who re liable under the joint decree, the decree nnot proceed against the present appellant.

3rd.—That no interest having been award- by the High Court decree, no interest uld be allowed by the Subordinate Judge.

On the first ground, we think it clear at the judgment-debtor appellant is liable der the decree. As already stated, the aint clearly charged him with others as ving ousted the plaintiff from the pro- rty. He did not choose to deny the ouster to appear in the suit, and he also did not pear in this Court, although he had an portunity of doing so by being made a pondent.

On the second ground, we think that there s been no release, as alleged, of two the defendants. All that has been done the plaintiff is that he has put in a peti- on estimating the mesne-profits of certain nongst the mouzahs held by those particular fendants. The judgment-debtor before if he pays more than his quota under e decree, has his remedy by a suit against e other defendants for contribution.

On the third ground, namely, as to in- rest, we do not find that the Subordinate dge has given any order with reference interest, and the decree of the High urt does not provide for any interest. he mesne-profits will be ascertained as rected by the lower Court.

The appeal is dismissed with costs.

The 24th January 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Landlord's Suit for Possession—Act VIII. of 1859, s. 2.

Case No. 617 of 1872.

pecial Appeal from a decision passed by the Officiating Additional Subordinate Judge of Dacca, dated the 28th December 1871, reversing a decision of the Moonsiff of Nechragunge, dated the 11th April 1871.

Kasheenath Bose and another (Defendants), *Appellants,*

versus

Sharoda Soonduree Chowdhrain and others (Plaintiffs), *Respondents.*

Baboos Bhugobutty Churn Ghose and *Shushee Bhoosun Sen* for Appellants.

Baboos Sreenath Doss and *Grija Sunkur Mojoomdar* for Respondents.

A landlord who fails in a suit to establish his right to get rent is not thereby prevented, under Act VIII. of 1859, s. 2, from bringing a suit to get possession of the land.

Glover, J.—THE question in this special appeal is whether the plaintiff is barred by section 2, Act VIII. of 1859.

It appears that there were altogether three suits brought by this plaintiff. First he sued for a kubooleut, and as regards 3 beeghas of land he lost his case. He then sued for a declaration of his right to receive the rent of these 3 beeghas, and lost that case also. He now brings this suit for possession of the same 3 beeghas.

The Subordinate Judge has held that this was not a suit similar to the one already decided, and has sent back the case to be tried on the merits.

We think this was a proper decision. A person might be a landlord, and yet not able to get the rent, because there might be no relationship of landlord and tenant between the parties, the tenant not having attorned to him. The fact of his having failed in the suit to establish his right to get rent would not prevent his bringing a suit to get possession of the land.

The appeal is dismissed with costs.

The 24th January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Act VIII. of 1859, s. 246—Appeal—Right of Suit.

Case No. 283 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 20th July 1872.

Mittoo Lall and others (Decree-holders), *Appellants*,

versus

Mahtab Kooeree and another (Judgment-debtors), *Respondents*.

Baboo Mohesh Chunder Chowdhry for Appellants.

Messrs. R. E. Twidale and *C. Gregory* and *Baboo Doorga Mohun Doss* for Respondents.

Where parties holding a decree, which declares that they have a lien to be satisfied by the sale of certain property proceed to attach and sell the property, and, in pursuing this course, are met by an objection under Act VIII. of 1859, s. 246, and that objection is adjudicated unfavorably to them, no appeal lies from such adjudication, though the parties are at liberty to bring a suit to establish their right.

Kemp, J.—We think that this appeal must be dismissed on the preliminary objection taken by the pleader for the special respondent. The appellants are the holders of a decree passed in September 1838, which was a money-decree. That decree, therefore, comes under the provisions of section 232 of Act VIII. of 1859. Subsequently, it is alleged, although this point is not admitted by the pleader for the respondents, that the appellants obtained a decree declaring that they have a lien to be satisfied by the sale of the property. This is not admitted by the pleader for the respondents, but even assuming that it is correct, the appellants had then to proceed, not under the section which the pleader for the appellants quotes, namely, section 229, which refers to proceedings which have been taken in delivering possession, but to attach and sell the property. In pursuing that course, they have been met by an objection under section 246. That objection having been adjudicated in favor of the special respondents, no appeal will lie to this Court. The special appellants are at liberty to bring a suit to establish their right. The decisions which have been quoted by the pleader for the special appellants are not in point. The first decision in the Bengal Law Reports refers to a question of jurisdiction which the defendant raised. The second decision in Volume IX., Weekly Reporter, refers to a question of limitation; and the last decision in the 5th Volume, Bengal Law Reports, refers to a conflict between the assignee of the Insolvent Court and an attaching creditor. These decisions have no bearing whatever upon the point before us. The special appeal must, therefore, be dismissed with costs on the preliminary objection taken by the pleader for the special respondents.

The 24th January 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges*.

Contribution—Interest—Act XXXII. of 1839.

Case No. 615 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan dated the 30th November 1871, affirming a decision of the Moonsiff of Kulna, dated the 15th December 1870.

Bistoo Chunder Banerjee (Plaintiff), *Appellant*,

versus

Nithore Monee Debia and another (Defendants), *Respondents*.

Baboo Umbica Churn Banerjee for Appellant.

Baboo Grish Chunder Mookerjee for Respondents.

A written demand need not be served before interest can be charged on a claim for contribution, Act XXXII. of 1839 not applying to contribution-suits.

In the absence of any contract to pay interest, it is in the discretion of the Court to give or withhold it; and the discretion is rightly exercised in withholding interest where a claimant for contribution sleeps over his right for a long time.

Glover, J.—The plaintiff in this suit was the purchaser of a right of action in a contribution-suit against certain parties. He brought the suit, and was successful in getting a decree against the defendants for certain sums to be paid by them severally. The present special appeal is preferred on the subject of interest. The Subordinate Judge refused interest on two grounds: *first*, because by Act XXXII. of 1839 no interest could be allowed, inasmuch as no written demand had been served on the debtor; and, *second*, because the decree-holder had allowed

ars to elapse before making his demand for terest.

The first reason given by the Subordinate dge is no doubt wrong, Act XXXII. of 839 not applying to contribution-suits. his point has been ruled in the case of holam Ahmed Shah *vs.* Beharee Lall, Marall's Reports, page 239, and in the case of llit Biswas against Prosunno Moyee ossee, 17 Weekly Reporter, page 179.

But the Judge has given another reason hich we consider a reasonable one, namely, at the decree-holder slept over his rights r no less than five years before making his mand for contribution, and we do not see y error in law which would justify our terfering with his order.

There was no contract between the parties pay interest; and there is no rule of law which, in the absence of such contract, an ard of interest is made compulsory. It s within the discretion of the Court below ther to give or to withhold interest, and ere is no ground for our interfering with s order.

The special appeal is dismissed with costs.

Mitter, J.—I concur.

The 24th January 1873.

Present:

e Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

rmanent hereditable (Surburakaree) Tenures —Transfers.

Case No. 616 of 1872.

ecial Appeal from a decision passed by he Officiating Judge of Cuttack, dated the 4th January 1872, reversing a decision of the Moonsiff of Balasore, dated the 27th March 1871.

asheenath Punee (Defendant), *Appellant,*

versus

ukhmonee Pershad Patnaik and others (Plaintiffs), *Respondents.*

oo Mohendro Lall Mitter for Appellant.

oo Obhoy Churn Bose for Respondents.

A zemindar is not bound to recognize the transfer of a permanent hereditable tenure effected without his consent, and cannot be compelled to register such transfer in his serishta; but the fact of such improper transfer does not deprive the old surburakar of his rights, or entitle the zemindar to get khas possession.

Glover, J.—THIS suit was brought by the plaintiff to reverse an order made by the Commissioner directing him to register in his zemindaree-roll the name of the defendant, the purchaser of a certain surburakaree tenure.

This tenure appears to be of a permanent hereditable nature, and a description of it is to be found in the case of Sudanundo Mytee against Nowruttun Mytee, 16 Weekly Reporter, page 290.

The Judge has held that it is a fact admitted by both sides that a tenure of this sort cannot be transferred without the consent of the zemindar, and also that the consent in this case was not given. He considered, therefore, that the order directing the plaintiff to register the defendant in his serishta was an improper one; he also decided that, as the tenure was transferred without the consent of the zemindar, the plaintiff was entitled to be maintained in possession.

Now, regarding the first point, there appears to be no contest between the parties that, before a surburakaree tenure can be transferred by sale, the consent of the zemindar is necessary, and it is not denied before us that such consent was not given. The transfer, therefore, to the defendant was an improper transfer, and the Judge was right in directing that the zemindar should not be compelled to register the purchaser in his serishta.

But we cannot uphold that part of his decision which directs that the zemindar should get what is called khas possession of the land. The mere fact of such a tenure being transferred without the zemindar's consent would not do away with the rights of the surburakar. The only thing that would be done away with would be the transfer itself, that is to say, the zemindar would not be bound to recognize the transfer, and the parties would revert to their original position, and the property would remain the property of the old surburakar, in whose possession it was before the transfer was made.

But it is said that the zemindar had brought evidence in the first Court to prove that the old surburakar had relinquished his rights in this tenure to the zemindar, and it was after that relinquishment that the

zemindar's son caused this tenure to be sold in execution of decree, under which sale the defendant acquired it. We find, on looking at the first Court's decision, that there was evidence of this fact, which, however, the Moonsiff disbelieved. We think that the zemindar has the right to have this evidence, especially as this was a point raised in the appeal to the Judge, considered by the Appellate Court, because if he could show by that evidence that the old surburakar had relinquished all his rights in the tenure before the sale, there would be no objection to the zemindar getting a decree to be maintained in possession.

Therefore, the first part of the order of the lower Court will be upheld, but on this point, namely, as to whether there was any relinquishment on the part of the old surburakar, the case will be remanded to the Court below. We make no order as to costs.

The 24th January 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Enhancement—Landlord and Tenant—Act X. of 1859, s. 4.

Case No. 586 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 21st December 1871, affirming a decision of the Moonsiff of that District, dated the 22nd August 1871.

Sham Churn Koondoo and others (Plaintiffs), *Appellants,*

versus

Dwarkanath Kubeeraj and another (Defendants), *Respondents.*

Baboo Grija Sunkur Mojoomdar for Appellants.

Baboo Bungshee Dhur Sen for Respondents.

To entitle a tenant under Act X. of 1859, s. 4, to protection from enhancement, it is necessary for him to prove, not that a uniform rate of rent has been collected, but that the rate of rent has not varied for 20 years previous to the suit.

Glover, J.—This is a suit for arrears enhanced rent after notice. The first Co found that the tenure was protected, in much as the tenant had proved uniform p ment of rent for 20 years, and was, therefo entitled to the presumption under section The Subordinate Judge held, on the co trary, that the tenure was liable to enhan ment, and he dismissed the plaintiff's s because he had not proceeded regularly, a not proved his grounds of enhancement.

So far as this point is concerned, we thi that the special appeal should be dismiss inasmuch as it is clear that the plain had not proved the rates which he alle the defendant had to pay him, and it found as a fact by the lower Court that evidence proved the rate which the defe ant was willing to pay. There is no er in law, therefore, in the Subordinate Judg decision so far.

But a cross-appeal has been filed by respondent on the question as to whe the tenure was or was not protected. alleges that the evidence on the record such as to give him the benefit of the sumption. Of course, it is not neces for us, as the case has been dismissed, to into the question as to whether the Subo nate Judge took a right view of the evide but we may say that the issue which fixed regarding this part of the case wa improper one. He seems to have consid that what he had to find was whether or an uniform rate of rent had been colle for 20 years previous to the suit. The does not say that an uniform rent must collected. What the defendant tenant ha prove was that, for 20 years previous to suit, the rate of his rent had not varied. is quite possible that a ryot may not paid his rent regularly, in which case th would be a variation in the amount of as shown by the receipts. If this kin variation were to be the test, no ryot w be safe, and the object of the law would frustrated. There was evidence on the cord of the fact that this tenant had paid as he had stated, and the dakhillas th selves do not, so far as we have exami them, show any variation in the rate of re We notice this point in order that no unnec sary difficulty may be placed in the way the tenant by reason of the finding of Subordinate Judge. We think it right state that the issue which was fixed in t case is not the correct one, and that question of variation is left an open one.

The appeal is dismissed with costs.

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The 28th November 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawence Peel.

Cause of Action—Limitation.

*On Appeal from the High Court at Calcutta.**

Gunga Gobind Mundul and others

versus

Bhoopal Chunder Biswas.

Mr. Leith and *Mr. Arathoon* for Appellants.

Mr. Cowie and *Mr. J. Cutter* for Respondent.

Of an estate left by H M, his son's widow, R D, became the rightful owner of a moiety, and his daughter's husband, S C H, to the remaining moiety. S conveyed to plaintiff (B C B) by a deed of gift two annas out of his eight-annas share. S, within the period of limitation, commenced a suit against the Ms for the whole of H M's estate; but pending the suit J was substituted as plaintiff under a deed of sale from S to him, and obtained a decree for an eight-annas share. One of the defendants (R D) appealed against the decree, and had it modified against her to a five-annas share. The Ms did not appeal, and the decree remained against them for eight annas. J executed the decree for five annas. In another suit, B C B's title to two annas under the deed of gift from S was established against J, who afterwards sold to the Ms the five annas which he had obtained and all his right, title, and interest under the decree. The Ms thus got possession of the two-annas share which J ought to have held in trust for plaintiff:

HELD that plaintiff's cause of action for the recovery of his two-annas share arose at a period subsequent to the execution of the decree by J, which was within the period of limitation.

Sir Barnes Peacock.—THE appellants in this case, the Munduls, were the defendants in the suit below. The respondent, Bhoopal Chunder Biswas, was the plaintiff. The suit was brought to recover possession of a two-annas share of a moiety of the estate left by the late Hurnarain Mundul. The defendants in answer to the plaintiff's suit set up the plea of limitation. The Court of first instance, as well as the High Court, held that the suit was not barred, and hence the present appeal.

The plaintiff in his plaint stated "that of "the estate left by the late Hurnarain Mun-"dul, Ramonee Dossee, widow of his son "Digambur Mundul, became the rightful "owner of, and entitled to, a moiety, and "Shumbhoo Chunder Haldar, father of "Protap Chunder Haldar, his daughter's son, "to the remaining moiety." That was the moiety which had belonged to Digambur's brother, Rajkristo Mundul. He then states: "On the 27th Maugh 1252 B.S., the said "Haldar conveyed to your petitioner by gift "two annas out of his eight-annas share, "and gave him in writing a deed of gift "duly registered." It was stated in the deed of gift that, whenever any of the real and personal properties of the said estate, which were in the possession and hands of Pearyloll Mundul and others, should come to hand, whether by possession taken personally or by amicable settlement, or by suit in Court, the plaintiff should get a two-annas share, Nobin Seekaree a one-anna share, and Shumbhoo five annas, out of the eight-annas share thereof, and that whatever expenses should be incurred by suit in Court in respect of any claim to any of the properties, or in recovering possession of any of the properties, the same should be defrayed by the plaintiff and Shumbhoo in the ratio of the aforesaid shares; that, if any amicable settlement should be made regarding any property, the plaintiff and Shumbhoo should do the same with the consent of all; that, if there should be occasion to institute any suit in Shumbhoo's sole name, or in the joint names of him and Ramonee Dossee as plaintiffs for any property, the plaintiff should pay the expenses thereof according to the aforesaid shares; and that after decree Shumbhoo and the plaintiff should get the property with mesne-profits and interest according to their shares. Shumbhoo, within the period of limitation, commenced a suit against the Munduls, No. 76 of 1854, for the whole of Hurnarain's estate; but pending that suit Joykristo was substituted as the plaintiff under a deed of sale from Shumbhoo to him. It was said that Joykristo held benamee for the Munduls, but whether he did so or not is not material. Joykristo proceeded with the suit commenced by Shumbhoo, and obtained a decree for an eight-annas share of the estate. Ramonee was a defendant in the suit against the Munduls. She appealed against that portion of the decree which affected her. The High Court modified the decree against her by limiting it to a five-annas share. The Munduls not having appealed, the decree remained binding upon them for the eight-annas share. Joykristo executed the decree under which a five-annas share was delivered to him in the manner in which delivery is made under executions of decrees

* From the judgment of Couch, C.J., and L. S. Jackson and Glover, JJ., in Regular Appeal No. 231 of 1869, decided 5th July 1870.

for land in the possession of ryots, *viz.*, by beat of drum and the affixing of bamboos, and he filed a receipt for the same in the Court of the Principal Sudder Ameen. The decree and execution put an end altogether to limitation. It is immaterial whether Joykristo obtained actual possession or not. In the suit No. 79 of 1861, the plaintiff's title under the deed of gift from Shumbhoo was established against Joykristo. Joykristo afterwards sold to the Munduls the five-annas share of which he had obtained possession under the execution, and all his right, title, and interest under the decree. Neither the Munduls who purchased from Joykristo, nor Joykristo who purchased from Shumbhoo, could have any better title than Shumbhoo himself. According to the deed of gift, the plaintiff was entitled to a two-annas share of all the property which should come to hand. A five-annas share came to hand under the execution, and the Munduls retained possession of the other three annas included in the decree under the deed of sale from Joykristo. The Munduls being in possession of that three-annas share, the plaintiff was entitled to two annas of the property of which Joykristo obtained possession under the execution. The Munduls having obtained possession of that two-annas share, the plaintiff is entitled to recover it from them. They obtained that possession after the execution of the decree and within the period of limitation.

It appears then that the Munduls got possession of the two-annas share of which Joykristo ought to have remained in possession in trust for the plaintiff. The plaintiff therefore has a right to say: "These two "annas belong to me. You, the Munduls, "are in possession of my two-annas share, "and I bring an action against you to re-"cover that share." Then, when was it that this cause of action arose? Why, it accrued, at any rate, at a period subsequent to the execution of the decree by Joykristo. That was within the period of limitation.

The High Court certainly do say: "The "present suit is brought to carry into execu-"tion the decree in that suit," speaking of Joykristo's suit "in which the plaintiff has an interest." Their Lordships do not understand that the High Court in using the words "to carry into execution," meant "to "get the decree executed by process of "execution according to law," but merely that the present suit is brought to give effect to that decree.

It appears to their Lordships that the suit is not barred, inasmuch as the defendan have obtained that possession which wrongful as against the plaintiff subsequent to the execution of the decree by Joykristo

Without, therefore, entering into t reasons of the High Court, their Lordshi are of opinion that the decision to whi they came was the correct one, and th will, therefore, humbly advise Her Majes that the decree of the High Court be affirm ed with costs.

The 24th January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontife *Judges.*

Notice under Act VIII. of 1859, s 216—Nazi Return—Evidence — Infructuous Proceedin in Execution—Bona fides.

Case No. 267 of 1872.

Miscellaneous Appeal from an order pass by the Subordinate Judge of Mymensing dated the 22nd June 1872, reversing order of the Moonsiff of Jamalpore, dat the 28th December 1871.

Mokoondonath Bhadoory (Judgment debtor *Appellant,*

versus

Shib Chunder Bhadoory (Decree-holder) *Respondent.*

Baboos Sreenath Doss and *Shushee Bho sun Sen* for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondent.

On an application being made for execution of decree, a purwanna was issued on the Nazir to ser notice under s. 216, Code of Civil Procedure, and return was made by the Nazir to the effect that the ser ing peon not finding the judgment-debtor at hon affixed the notice on the zemindary cutcherry of t judgment-debtor. As this return was used as evidence in both the Courts below without any objection bei made, the High Court (following a precedent which ha regarded such return as *primâ-facie* evidence) won not admit of its being objected to in special appeal o the ground that it was not legal evidence.

HELD, further, that the mere absence of further pr ceedings following the notice did not deprive t proceedings taken by the decree-holder of the charact of *bonâ-fide* proceedings.

Kemp, J.—IN this special appeal th judgment-debtor is the appellant. The d cree was passed on the 6th of July 1861, an was confirmed in appeal by this Court on th 19th of July 1863. It was admitted that July 1866 the judgment-debtor paid a

sum of Rs. 164 under the decree; the question between the judgment-debtor and the decree-holder with reference to that payment being whether, as alleged by the judgment-debtor, it was a payment in full of the whole decree; or whether, as alleged by the judgment-creditor, it was a payment for costs. Be that, however, as it may, it is admitted that in July 1866 proceedings under the decree were taken. In April 1867, an application was made to execute the decree, but nothing appears to have been done; and, on the 25th of May 1867, the case was struck off the file. Then a third application was made on the 3rd of May 1869. The decree-holder was directed to put in tullabana for service of notice, which order he complied with. A purwanna was then issued on the Nazir directing him to serve the usual notice under section 216, and the return of the Nazir, which is on the record, is to the effect that the serving peon not finding the judgment-debtor at home affixed the notice on the zemindary cutcherry of the judgment-debtor. The case was eventually struck off on the 20th of May 1869. A fourth application was made in June 1870. The judgment-debtor upon service of notice appeared and objected that the application to execute was barred. Upon this, the judgment-creditor was directed by the Court to produce evidence to show that the application was in time. On the day fixed for the hearing of that evidence, namely, on the 12th of November 1870, the pleader for the decree-holder not being prepared with his evidence, the case was struck off. It was not withdrawn as stated by the pleader for the appellant, but struck off. The present application, which is the fifth one made in the course of the proceedings, is dated May 1871.

The first Court held that the application was barred on the ground that the formalities laid down in section 212 had not been complied with.

On appeal, the Subordinate Judge held that the application was in time; that the proceedings taken in May 1869 were *bonâ-fide* proceedings to keep the decree in force; and that these proceedings having been taken within three years from the last application which was made in May 1871, the decree-holder was in time; and an order was passed directing the execution to proceed.

We have, therefore, to decide whether the lower Court has found on legal evidence that the proceedings taken in 1869 on the part of the decree-holder were *bonâ-fide* proceedings taken with the view of keeping the decree in force. Several decisions have been quoted by the pleaders on both sides in the course of the argument. It appears to us that, in deciding the question whether proceedings of any particular date in execution of a decree are *bonâ fide*, we must look to the circumstances of the case before us. Now, in this case, it is clear that the first Court did, without any objection being made in the course of the argument by the appellant, make use of the Nazir's return as evidence. It was also allowed to be used as evidence in the Appellate Court; and for the first time the pleader for the appellant now objects that this evidence is not legal evidence, and that the finding of the Subordinate Judge that the proceedings were *bonâ fide* is based upon evidence which is not admissible.

In a decision reported in Volume XV., Weekly Reporter, page 204, Mr. Justice Norman ruled that the report of a Nazir in the matter of the service of a notice was *primâ-facie* evidence. There can be no doubt that in this case a purwanna to the Nazir was issued; that the report of the Nazir was brought to the notice of the Court, and was filed with the proceedings. We therefore think, looking to the fact that this evidence was used in both the Courts below without any objection on the part of the special appellant, that we cannot admit this objection; and as the Court below has, under the whole of the circumstances of the case, found that the proceedings of the decree-holder in 1869 were *bonâ fide*, we ought not to disturb that finding in special appeal; and further the mere fact of the absence of any further proceedings to attach the property of the judgment-debtor in 1869 following upon the notice does not, in our opinion, deprive the proceedings taken by the decree-holder of the character of proceedings to enforce or to keep alive the decree which he had obtained. It may be that, in the absence of the judgment-debtor, the notice not having been served personally upon him, the decree-holder was unable to point out property for attachment, or for some other reason allowed the application to be struck off; but that he did take *bonâ-fide* proceedings in 1869 appears to us clear from the whole of the circumstances of the case, and the Subordinate Judge's judgment is right in finding that the proceedings of the decree-holder in 1869 were *bonâ fide*, although these proceedings were for the time being infructuous.

On the whole case, therefore, finding that

there has been a *bond-fide* proceeding on the part of the judgment-creditor to keep in force his decree within three years from the time the last application was made, or within three years from May 1871, we dismiss the special appeal with costs payable by the special appellant.

The 27th Janaury 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Construction—Ostensible Sale—Onus Probandi.

Case No. 668 of 1872.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 10th February 1872, affirming a decision of the Subordinate Judge of Dacca, dated the 16th August 1871.

Bykunt Chunder Chuckerbutty (one of the Defendants), *Appellant,*

versus

Dhunput Singh Bahadoor (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Mr. R. T. Allan for Respondent.

In construing a judgment, if a difficulty is found in reconciling the conclusion ultimately arrived at with the previous part, such part must be rejected.

Where the sale of a judgment-debtor's property is found to have been not a real one, and the ostensible vendees sell it to others, these are bound to show that they purchased *bond fide* and without notice.

Couch, C.J.—I THINK we must consider the latter part of the judgment as expressing the conclusion to which the Judge ultimately arrived, and if we find a difficulty in reconciling with it the previous part, we must reject that. He says, towards the end of the judgment: "I have already declared that there is "evidence that the debtors are still possessed "of interest in the properties nominally trans-"ferred to Eshan. The circumstances at-"tending the sales of the 11th Joisto justify "this. For it may be asked, why were these "sales made? Ostensibly to preserve the "family possessions, but upon the assump-"tions now contended for that they were "*bond-fide* transfers, there was no preserva-"tion of family-property. Why was not a "portion sold before the family-dwelli "was allowed to go up to auction. T "decree-holder was so far accommodating "to agree to stop proceedings in Bysack up "a promise that he would be paid off by t "sales which would take place in Joisto I think that is very sensible. He says h can I look upon this as a real sale when t family dwelling-house, which need not h been sold, is professed to be sold. If I w dealing with the question of fact, I sho certainly agree in this remark. He th goes on: "It may, of course, be said that "was better to sell the property to a frie "than to run the risk of an auction-sa "But the fact that the sales were made "friends or relations of course raises a s "picion that there may have been an und "standing between them." That is a j observation; it does raise a suspicion t instead of there being a real sale, there w some understanding between the parti He proceeds: "And this suspicion acqui "some degree of certainty if it is seen t "the Ahiruns still retain possession."

Having made these remarks he says: "would, therefore, sum up my conclusions "be that I find that, in fact, the sale "Eshan was not a *bond-fide* sale, for the "are good grounds for believing that t "debtor-defendants have all along been "possession." It has been said that t present appellants, the defendants, have be in possession for some time, but it is cl from this passage that the Judge did n think they had, and if there was any appar possession by the present appellants, it w not a real possession. It was probably giv to them to give a color to the title which became necessary to set up in order to def the execution of the person who is the plai iff in this suit. Then the Judge says: "I "there are not sufficient grounds for findi "that this sale, which took place in 1271, w "to defraud the plaintiff, as his executi "was not taken out for 4½ years subseque "ly; nor are there grounds for finding th "the satisfaction of the decree held "Rumun Mohun Neogy was unreal. I "I find that the allegation that the debt "defendants have no rights in the talook "false." There is apparently an incons ency in this, and the way in which I sho explain it, and what I think the Judge mea is that, having come to the conclusion th the money was paid by Eshan Chunder satisfy that decree, there was to that ext a good title in Eshan Chunder, and he had charge upon the property for the mon

ich he had so paid. Taking that view, says: "I would therefore allow their ts to be put up to auction."

He seems to have considered that, al-ugh the sale to Eshan was not a *bonâ-*, but only an ostensible one, yet, inas-ch as Eshan found the money by which decrees were satisfied, to that extent e was a right which ought to prevail inst that decree-holder. I do not know ther he was right, upon the matter of , in coming to that conclusion—whether not probable that the right conclusion ld have been that the money was not in provided at all by Eshan, but by the ers of the property; but he has come to it, in that way I understand his finding. t being so, there is no objection to the ee which he has passed which allows the ts that remained in the judgment-debtors e put up to auction.

t was objected that it has not been found the present appellants were not *bonâ-fide* chasers without notice, in which case they ht, although the sale to Eshan was a dulent sale, have a good title. But when s found that the sale to Eshan was not a one, but ostensible only, it became neces-y for the defendants to show that they chased *bonâ fide* and without notice, ause ordinarily they could take only what an was entitled to give. If there was not lid sale to them, they ought to have had defence distinctly put before the Court, an issue framed that there might be a ing upon it. It would not be right to allow rson who has put forward his defence in a eral way, and allowed an issue to be framed n it which has been found against him in lower Courts, to say, in a special appeal, ere is a question of fact which the Courts w have not found, and, therefore, I am led to have the decree reversed," when, if question had been raised before the lower rts, there might have been a finding n it. There are many cases in which, if were at liberty in a special appeal to deal h questions of fact, we should have no itation in finding against the party who ks to take advantage of the want of a ling. So far as I can judge from what is ore us in this case, I should think that, if question of the *bona fides* of the sale to present appellant had been raised, there ld have been no doubt whatever as to t the finding ought to be.

I think the appeal must be dismissed with ts.

Glover, J.—I am of the same opinion.

The 28th January 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Vakeel's Fees—Contract—Practice.

Case No. 701 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 29th February 1872, reversing a decision of the Sudder Moonsiff of that District, dated the 25th September 1871.

Judoonath Dutt and others (Defendants), *Appellants,*

versus

Moonshee Rushad Ali (Plaintiff), *Respondent.*

Baboos Nil Madhub Bose and *Aukhil Chunder Sen* for Appellants.

Baboo Sreenath Dass for Respondent.

In a suit by a pleader for the balance of vakeel's fees, where it was found that there was no contract, HELD that, in considering the proper fee to be allowed, the Lower Appellate Court had nothing else to guide it but what, according to the practice of the Court, was allowed as costs between party and party.

Couch, C.J.—THE Moonsiff has found that there was a contract for the 15 rupees. The Judge on appeal has differed from him, and has found that there was no contract for the 15 rupees. It was then the business of the Lower Appellate Court to award to the plaintiff what it considered upon the evidence in the case to be the proper fee. We think it might very well, in considering what the proper fee was, take into consideration what amount would be allowed by the Court in costs between party and party.

Then, in addition to that, it is found, and we must take it as correctly found, that the defendants had claimed the Rs. 788-8, the amount awarded to the plaintiff from the opposite party as being the plaintiff's fee, and had entered a satisfaction of the decree including that sum. We cannot now go into the question whether that was true or not. The Judge seems to have considered that they had done so, and that might well be taken against the defendants as an admission that it was the proper fee of the plaintiff.

There being before the Judge the evidence of this conduct of the defendant and the fact that, according to the practice of the Court, that is, the fee usually allowed between party

and party, he might properly come to the conclusion that the plaintiff was entitled to that amount. There was nothing else to guide him in saying what the amount should be. As soon as he found that there was no special contract proved, the ordinary amount to be allowed would be what, according to the practice of the Court, was allowed, and he has only awarded that.

The appeal must be dismissed with costs.

The 28th January 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Mokurruree Tenures—Rights of Occupancy—Act VIII. of 1865, s. 16.

Cases Nos. 698 and 721 of 1872.

Special Appeals from a decision passed by the Judge of West Burdwan, dated the 2nd February 1872, affirming a decision of the Moonsiff of Bancoorah, dated the 12th May 1871.

Bholanath Ghossal and others (Defendants), *Appellants*,

versus

Kedarnath Banerjee (Plaintiff), *Respondent*.

Baboo Kalee Mohun Doss for Appellants.

Baboo Nil Madhub Sen for Respondent.

The auction-purchaser of a mokurruree tenure cannot set aside rights of occupancy existing from a period prior to the creation of such tenure, Act VIII. of 1865, s. 16, referring to incumbrances created subsequently.

Couch, C.J.—By the written statement of the defendants, who are appellants before us, they set up in answer to the plaintiff's claim that they were in possession, and had a right of occupancy prior to the creation of the mokurruree right which was purchased by the plaintiff; and if that were so, the plaintiff could not, by becoming the auction-purchaser, set it aside. What he could set aside under section 16, Act VIII. of 1865, are incumbrances, as they are there called, created subsequently to the creation of the mokurruree, and so this was really the essential question in the suit. The second issue as framed by the Moonsiff is in such general terms as to allow that question to be tried, for he says "or whether the right to and possession of the same, as pleaded by the defendants, are true," that is as set up in their written statement. The Moonsiff does not appear to have tried that question, and to have come to any finding upon it. Probably he got somewhat confused by hearing the two cases together, and lost sight of this, for the present appellant, important question.

Then, he not having tried that, upon appeal to the Judge, it is again brought forward in the second paragraph of the grounds of appeal. The Judge also does not seem to have directed his attention to it. He seems to have thought that the question was whether the plaintiff was a ryot or not; and treating the plaintiff as a ryot, he decided that there was no right of occupancy in the defendants, because they could not have a right of occupancy from a ryot. That was beside the question which the appellants had raised.

Both the decrees must be reversed so far as the subject-matter of these appeals is concerned, and the suit must be remanded for re-trial upon that question. The costs of the appeal will form part of the costs in the suit.

The 29th January 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges*.

Act X. of 1859, s. 107—Judgment-debtor—Right of Suit.

Case No. 713 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 8th February 1872, modifying a decision of the Moonsiff of Salikha, dated the 1st August 1871.

Prosunno Moyee Dossee (Plaintiff), *Appellant*,

versus

Ram Gobind Ghose and others (Defendants), *Respondents*.

Baboo Hem Chunder Banerjee for Appellant.

Baboo Kumla Kant Sen for Respondents.

The right to bring a suit under Act X. of 1859, s. 107, is confined to one of the two parties concerned, *viz.*, decree-holder and claimant; it does not refer to the judgment-debtor who has nothing to do with the claim.

Glover, J.—The only question we have to decide in special appeal is whether the Subordinate Judge was right in finding that the

intiff's claim to half the property in dis-
e was barred by reason of her not having
ought a suit under section 107, Act X.
1859, to contest a decision by which a
imant, who appeared in the execution-
ceedings; demanding half the property in
pute, succeeded in getting that half given
to him. The Subordinate Judge thinks
t, because the plaintiff did not then think
per to bring such a suit, she is now barred
coming to the Civil Court.
The Subordinate Judge is, we consider,
ng in his interpretation of the law.
e section in question, which is worded in
isely the same manner as the correspond-
section in the Civil Procedure Code,
rs to the party "against whom a decision
given;" that is to say, as between the
ree-holder and the claimant, it is one of
se two parties only who has the right to
g a regular suit. The present defendant,
o was the claimant in that case, succeeded;
the only person left to bring a suit was
zemindar. The present plaintiff was the
gment-debtor in that case, and had no-
ng to do with the claim in any way.
early it was not for her to bring the suit
der the provisions of section 107.
All the other facts in this case have been
nd by both the Courts below in favor of
plaintiff. It has been found that the
a of relinquishment set up by the defend-
is false, and that there was collusion
ween the defendant and the zemindar; it
been found likewise that the plaintiff
ousted by the defendant. The special
pondent's vakeel has endeavoured to make
that there were two relinquishments in
case, one to the zemindar, and the other
the defendant. But this was never the
e of the defendant in any stage of the
oceedings. There is nothing whatever to
found of the second relinquishment in
written statement, nor was the point
er brought before either of the Courts
low.
We think that the plaintiff is entitled to
full decree, with costs, for all that she sued
r, and an order will pass accordingly.

The 30th January 1873.

Present:

he Hon'ble F. B. Kemp and C. Pontifex,
Judges.

Suit—False Evidence—Possession.

Case No. 633 of 1872.

Special Appeal from a decision passed by the Deputy Commissioner of Julpigoree, dated the 13th January 1872, reversing a decision of the Moonsiff of that District, dated the 24th June 1871.

Kultoo Mahomed (Plaintiff), *Appellant,*

versus

Hurdeb Doss (Defendant), *Respondent.*

Baboo Kalee Kishen Sen for Appellant.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Respondent.

Applying a principle laid down by the Privy Council, that, in this country, a whole case, if good, should not be dismissed, because the plaintiff has foolishly and wickedly relied in support of it upon false evidence, the High Court held that a Lower Appellate Court was wrong in dismissing a case (which had been decreed by the first Court), because the copy of a kobala filed by plaintiff was found to contain signatures of witnesses purporting to be subscribing witnesses, which had been added to the original deed, although plaintiff's possession was admitted, and the only question was as to the character of that possession.

Kemp, J.—The plaintiff, special appellant before us, sued for possession of certain lands comprised in a jote, on the allegation that, on the 26th of Jeit 1253, his father purchased the said jote from the defendant No. 1; that his father obtained a mutation of names with the consent of the vendor in the zemindar's serishta; and that from 1253 the father and, after his death, the plaintiff himself had paid rent to the zemindar for this jote; that the defendants are chookandars in respect of ten or twelve dones of land comprised in the said jote; that a suit was brought by the plaintiff for the rent of that land; and that the defendants in that suit raised an objection to the title of the plaintiff, and the Deputy Collector referred the parties to a Civil Court to establish their title, and dismissed the rent-suit; that, under color of that decision, the defendants have, by refusing to pay rent to the plaintiff, dispossessed him. The plaintiff says that the decision of the Deputy Collector has prejudiced his title, and he comes into Court to have his title established, inasmuch as he has been dispossessed by the defendants refusing to pay rent.

The first Court decreed the plaintiff's suit. The Moonsiff's decision, which has been read to us, is a very careful one. He went into the whole of the evidence, and he has found that the plaintiff's father in 1253 purchased this jote; that he obtained registration of his name in the zemindaree serishta; that he paid rent to the zemindar; and that the plaintiff also is in possession as jotedar paying

rent to the zemindar; that the allegation of the defendants with regard to the lease is false; and that the defendants had not been able to show that at any time they have paid rent to the zemindar. The first Court, therefore, found for the plaintiff.

The Appellate Court, the Deputy Commissioner of Julpigoree, admits that the judgment of the Moonsiff is a "very exhaustive and elaborate one," but says that he cannot "agree with the Moonsiff's finding." The Deputy Commissioner takes the case of the plaintiff as resting entirely upon the kobala, and finds that that deed is a suspicious-looking one, as from the copy of it filed by the defendants, it appears that the signatures of several witnesses, purporting to be subscribing witnesses, have been added to the original deed, these names not being found in the copy furnished by the defendants. The Deputy Commissioner, therefore, holds that it is clear that the deed has been tampered with, and that it cannot be proper to give a decree upon such a deed. He reversed the order of the lower Court, and dismissed the plaintiff's case.

In the first Court an issue was clearly raised, namely, the second issue: "Under "what title and in what way the jote under "claim was held in possession by both parties "before and after the year 1260." The possession of either party, plaintiff or defendants, was therefore an important element in the case, which required consideration. The case of the defendants is that the plaintiff was never in possession, and that any payments that he or his father may have made to the zemindar from 1253 were payments made by them as their agents, and not as jotedars in their own right. On the other hand, the case of the plaintiff is that his father purchased this jote from the defendants in 1253, obtained mutation of names in the zemindar's cutcherry with the knowledge and consent of the defendants, and paid rent to the zemindar as jotedar in his own right, and not as agent of the defendants. The first Court found this point in favor of the plaintiff, but the Deputy Commissioner has not gone into that part of the case at all, and has contented himself with finding that, because some names have been added to the original deed of sale, this deed must be considered to be not proved. Now; there have been cases in the Privy Council, and notably that of Ranee Surno Moyee *vs.* Sutteesh Chunder Roy, 2 Weekly Reporter, page 14, where a case was based upon documents which were proved to have been forged, but where the case, independent of those forged documents, was a good one; and their Lordships observe that in this country it would not be right if the plaintiff has a good case, and has foolishly and wickedly relied in support of it upon false evidence that the whole case should be dismissed. We do not go to the extent of saying that this is a false kobala; on the contrary, the deed, we think, may be a genuine deed, and the plaintiff may have, perhaps, because the witnesses were dead, or for any other purpose, foolishly taken the extra precaution of having certain names entered on it as subscribing witnesses to enable him to adduce evidence in support of it; but, be that as it may, we think that, in a case of this description, it was the duty of the Judge to go into the whole case, and to find upon the question decided by the Court of first instance, and which is by far the most important question in this case, namely, whether the possession of the plaintiff from 1253, which is an admitted possession, was a possession as agent of the defendants or a *bond-fide* independent possession under a jotedaree right.

We, therefore, remand the case. The lower Court, after consideration of the question of possession upon all the evidence adduced by the plaintiff in support of his alleged possession as jotedar, and by defendant in support of his alleged possession as lessee, will decide whether that possession was under a jotedaree right or otherwise. Costs to follow the result.

The 30th January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Rent-suit—Excess Land—Notice under Act VIII. (B. C.) of 1869, ss. 18 and 19.

Case No. 711 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 2nd January 1872, affirming a decision of the Moonsiff of that District, dated the 20th June 1871.

Ram Narain Lall (Plaintiff), *Appellant,*

versus

Gumbeer Singh (Defendant), *Respondent.*

d

Baboo Bama Churn Banerjee for Appellant.

Baboo Ram Churn Mitter for Respondent.

In a suit for arrears of rent after deduction of payments, where the claim embraced excess land found on measurement, and was based on a kubooleut which stated that the ryot would pay for such excess at the same rate as for the rest of the land and from the date of the kubooleut:

HELD that there was no question of enhancing the rent of rent, and the ryot was not entitled to notice under Act VIII. (B.C.) of 1869, ss. 18 and 29.

Kemp, J.—THIS is a suit for rent of the years 1277 and 1278 after deducting payments made by the ryot. The suit was based upon a kubooleut dated the 27th of Pous 1277. The plaint goes on to say that the original pottah was for 29 beeghas 10 cottahs of land, at the rate of Rs. 2-13 per beegha; that there was a stipulation that, if, on measurement, the actual area be found to be in excess of the 29 beeghas 10 cottahs, the ryot would pay for the whole land, that is to say, for the 29 beeghas 10 cottahs *plus* any excess that might be found on measurement, at the same rate, namely, at the rate of Rs. 2-13 per beegha. The plaint then states that on measurement it was found that the defendant, the ryot, holds 41 beeghas 17 cottahs, which, at the rate of Rs. 2-13 per beegha, yields the sum of Rs. 135-5; and that, after deducting payments made by the defendant, amounting to Rs. 127-11-5, the suit was brought for the balance due for the period above stated. The pleas raised by the ryot defendant are two, namely: *1st*, that he is entitled to notice under sections 18 and 19 of Act VIII. of 1869; and, *2ndly*, on the merits, he denies that there is any excess area, but, on the contrary, that the area is, as stated in the original pottah, namely, 29 beeghas 10 cottahs.

Both Courts have dismissed the plaintiff's claim on the preliminary objection taken by the ryot that notice ought to have been served.

We think that these decisions are wrong. The defendant is not a ryot holding or cultivating land without a written engagement, but under a written engagement not specifying any period. In this case, there was no question of enhancing the rate of rent, and the terms of the kubooleut, which has been read to us, are clear to the effect that after measurement the ryot will pay for any lands which may be found to be in excess of the land mentioned in the kubooleut, namely, 29 beeghas 10 cottahs, at the same rate of Rs. 2-13 per beegha from the date of the kubooleut, namely, the 27th of Pous 1277.

We, therefore, reverse the decision of the Court below, and remand the case for trial on the second plea raised by the ryot, namely, what is the area in his occupation. Costs to follow the result.

The 30th January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Decree—Execution.

Case No. 237 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Dinagepore, dated the 13th May 1872.

John James Gray (Opposite Party), *Appellant,*

versus

Jogendro Narain Roy (Decree-holder), *Respondent.*

Baboos Juggadanund Mookerjee and *Romesh Chunder Mitter* for Appellant.

Mr. J. T. Woodroffe and *Baboo Mohinee Mohun Roy* for Respondent.

A decree having been passed by a Bench of the High Court for possession of 200 beeghas of land and declaration of title over 10 plots within specified boundaries was amended, on application, after issue of a rule *nisi*, by the same Bench by the insertion of the words "according to the map prepared by the Ameen, Pran Nath." In the meantime another Bench expressed an opinion that the map in question was not a good map, inasmuch as it did not agree with the thakbust map, and that there was some indefiniteness as to the northern boundary:

HELD that as this decision of the latter Bench was before the former Bench, when it amended its original decree, and as the order of amendment was clear and definite in its terms, and as the 200 beeghas were delineated in the map, the decree should be executed.

Kemp, J.—IN this case it appears that, on the 30th of March 1864, the respondent obtained a decree for possession of 200 beeghas, and a declaration of his title over 10 plots within boundaries indicated in his plaint. The original suit was for possession of 200 beeghas, and for declaration of title with reference to the remaining plots of land. On the 20th of April 1870, the original decree, which was passed by Sir Barnes Peacock and Mr. Justice Shumboo Nath Pundit, was amended on the application of

the decree-holder after issue of a rule on the opposite party to show cause why the decree should not be amended by inserting the words "according to the map prepared by the Ameen, Pran Nath;" and after hearing the vakeels on both sides, the rule was made absolute, and it was declared that it was clearly the intention of the Court to give a decree for the land as pointed out in the map of Pran Nath Ameen. The Court then went on to say "that, whether the boundaries in that map were so deficient as to render it difficult or impossible to identify the land was not a matter for the consideration of the Court." Upon this the decree-holder applied for execution, and the Subordinate Judge, after stating that the plea raised by the judgment-debtor that the decree was barred had been abandoned, observes that he had no power to question the propriety of the High Court's order which he was bound to execute. He, therefore, directed process of execution to issue upon the amended decree of this Court, and further observed that, whether the decree-holder derived, to use the words of the Subordinate Judge, "any benefit under that process or not, it was not for him to consider."

It is now contended in appeal that, inasmuch as the decision which was passed by Justices Bayley and Hobhouse on the 17th of August 1869 ruled, as it is alleged by the pleader for the appellant, that the decree could not be executed, the present application on the part of the decree-holder is merely with a view to re-open a question which had already been finally set at rest by the decision of those learned Judges, dated the 17th of August 1869.

We think it clear that it is our duty to execute the decree passed by Sir Barnes Peacock and Mr. Justice Shumboonath Pundit as amended by the subsequent order passed by them after hearing the arguments of the vakeels on both sides. With reference to the decision of Justices Bayley and Hobhouse, we do not find that that decision goes any further than to express an opinion that the map drawn by the Ameen Pran Nath is not a good map, inasmuch as it does not agree with the thâk map, and also that there is some indefiniteness as to the northern boundary—the plaintiff stating it to be Koshalpore, and the defendants stating it to be Narainpore; but taking into consideration the fact that that decision was before Sir Barnes Peacock and Mr. Justice Shumboonath Pundit when they passed the order amending the original decree, and as that order appears clear and definite in its terms, namely, that it was the intention of the Court to give a decree for the land as pointed out in Pran Nath Ameen's map, and as it is not disputed that in Pran Nath's map 200 beeghas were delineated, it is for the lower Court to execute the decree as amended by this Court on the 20th April 1870.

We, therefore, dismiss this appeal with costs.

The 1st February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justic*, and the Hon'ble L. S. Jackson, F. A. Glover, Dwarkanath Mitter, and C. Pontifex, *Judges.*

Majority—Hindoos in Calcutta.

Cally Churn Mullick

versus

Bhuggobutty Churn Mullick and others.

In the Matter of the Petition of Benodebehary Mullick.

The Advocate-General and *Mr. Woodroffe* for Benodebehary Mullick, Defendant, Petitioner.

Mr. Lowe for the Plaintiff.

Mr. Millet for Bhuggobutty Churn Mullick, Defendant.

Mr. Phillips for the Official Trustee and Receiver.

The age of majority of a Hindoo resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil, is the end of 15 years.

THE defendant Benodebehary Mullick on the 15th of August 1872, applied, on notice to the Receiver and the plaintiff and the other defendants, for an order that the guardian appointed in this cause under orders, dated the 24th of March 1866 and 27th of September 1870, be discharged and that he be allowed to appear in this suit in person without a guardian; and that the Receiver also appointed in this cause under the order of the 27th of September 1870 be discharged, and pay the balance in his hands to the defendant; also that the money in Court standing to his

dit be paid to him on the ground of his ing attained his majority, namely, the age ixteen years and six months.

The application came on for hearing be- e Macpherson, J., and that learned Judge rred the matter to the Full Bench with following remarks:—

The petitioner, Benodebehary Mullick, entitled to have certain moneys which are in Court paid over to him on his attain- g majority. He applies for the payment the money now, on the ground that he attained his majority. He states in his tion (which is verified):—

"That your petitioner is a resident of cutta from his birth, and domiciled there- and that the said Romanauth Mullick, father of your petitioner, was also a re- nt of Calcutta and domiciled therein, and your petitioner has no properties situat- in the mofussil. That your petitioner is of the age of sixteen years and six nths," and, therefore, has attained the age majority.

This raises the question whether, under XL. of 1858, eighteen is the age of ma- ty of Hindoos resident and domiciled in town of Calcutta, and not possessed of perty in the mofussil.

Until quite recently sixteen was always med to be the age of majority among doos in Calcutta; but doubts have been rtained on the subject since the decision the Full Bench in the case of Madhu- an Manjee* (1 B. L. R., p. 49) and in unath Mitter *vs.* Bolyechand Dutt (7 L. R., p. 607). Phear, J., held that, by operation of Act XL. of 1858, the period minority extends among Hindoos to teen years, as well within the original l jurisdiction of the High Court as hin the jurisdiction of the Civil Courts in mofussil. More lately the same learned ge held in Archer *vs.* Watkins (8 L. R., p. 372), that an Eurasian in Cal- a, who is not an European British sub- , comes under Act XL. of 1858, and refore attains majority at eighteen years.

The question was raised before me (but decided) in the matter, In the goods Gangaprasad Gosain (4 B. L. R., p. 40), also before the Appellate Court (5 L. R., p. 80).

In his judgment in the case of Kamikha- ad Roy (5 B. L. R., p. 517), Mr. Justice rkby states that as, in the course of evi- ce, it appeared that one of the parties was of the age of seventeen years; and as it has been held that a Hindoo does not come of age till eighteen, he had ordered a guardian for him to be appointed, &c.

It appears to me that Act XL. of 1858 was intended to apply to the mofussil, and not to persons residing in the town of Calcutta, and not possessed of property in the mofussil. But the matter is a very important one, and, therefore, I refer it for the decision of a Full Bench.

The questions I refer are:—

1. What is the age of majority of a Hindoo resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil?

2. To what extent does Act XL. of 1858 have operation on persons resident in the town of Calcutta?

The Advocate-General (for the Petitioner).—Act XL. of 1858 does not, and never was intended, to apply to Hindoos resident in Calcutta. The first section of that Act repeals certain Regulations which applied to the mofussil only, and the Act was for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal in the place of those repealed Regulations. Moreover, the words of the various sections, "the Civil Court" and "the Collector" show that the Mofussil Courts, and not the Supreme Court, were meant. The term "Civil Court" is defined by section 29, and that section expressly declares that the expression "Civil Court" shall not include the Supreme Court, and that nothing in the Act "shall be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction." To hold that section 26 of the Act, fixing the age of majority at eighteen, applied to Hindoos resident within the jurisdiction of the High Court, would be affecting the powers of the High Court, since the High Court has treated Hindoos resident within its jurisdiction as attaining their majority at the age of sixteen years. The 26th section is expressly limited to the purposes of that Act, and those purposes are declared by the second section: "The care of the persons of all minors (not being European British subjects) and the charge of their property shall be subject to the Civil Court." This Act can only be applicable to the mofussil. Phear, J., in Jadunath Mitter *vs.* Bolyechand Dutt, hinges the whole of his judgment on the title of the

* 10 W. R., F. B., 36.

Act. He says at p. 611 of 7 B. L. R.: "The title of the Act and its preamble ran thus": And the learned Judge then sets out the title and the preamble; and after that goes on to say: "If I endeavour to gather the purposes of the Act from these paragraphs alone, there is obviously no reason whatever for saying that section 26 does not extend to persons within the area of Calcutta, just as much as to persons in any other part of the Presidency." The title of an Act is no part of the Act, and is not to be regarded in construing it (Bacon's Abridgment, vol. VII., p. 452). Section 26 must be read with sections 3 and 4, and the purposes of the Act will be found to restrict the 26th section to the mofussil. The argument of inconvenience does not apply here. The Legislature have clearly expressed their intention in the Act, and the anomaly of having two standards of majority, one for the mofussil, and one for Calcutta, does not affect the question. To extend the period of minority does affect the powers of the High Court.

The late Chief Justice in the case of Madhusudan Manji *vs.* Debigobinda Newgi (1 B. L. R. 49), held that every person, not being a European British subject, who has not attained the age of eighteen years, is a minor for the purposes of Act XL. of 1858, and he is a minor, whether proceedings have been taken for the protection of his property or the appointment of a guardian or not. That is scarcely consistent with the 3rd and 4th sections of that Act. [*Couch, C.J.*—That is a Full Bench Ruling, and I think it must be held to be the law. *L. S. Jackson, J.*—The rule at p. 710 of Broughton's Civil Procedure Code, 4th edition, is: "Every decision of a Full Bench shall be treated as a conclusive authority upon the point of law or usage having the force of law, determined by the Full Bench, unless it be (subsequently) reversed, or a contrary rule be laid down by the Judicial Committee of the Privy Council. A Full Bench shall consist of not less than five Judges."] If Act XL. of 1858 had enacted once for all that eighteen was the age of majority, it would have been superfluous to have re-enacted the same provision in the Succession Act (Act X. of 1865); and again in Act IX. of 1871, section 3, a minor is defined to be a person who has not completed his eighteenth year. In the Goods of Gangaprasad Gosain (4 B. L. R., App. 43), Mr. Justice Macpherson declined to express any opinion on this point; but in this reference he expresses his opinion that Act XL. of 1858 was not intended to apply to Hindoo resident in Calcutta not possessing property in the mofussil.

Mr. Lowe, on behalf of the plaintiff, did not object to the order being made.

Mr. Millet, on behalf of Bhuggobutty Churn Mullick, consented to the order.

Mr. Phillips, on behalf of the Receiver contended that Act XL. of 1858, so far as regards section 26, applies equally to Hindoos resident in Calcutta and the Mofussil, and that, altering the *status* of the individual as regards the period of majority, did not affect the powers of the High Court.

The Advocate-General was heard in reply.

The Court took time to consider its judgment, which was delivered on the 1st February 1873 by—

Couch, C.J.—The questions referred to the Full Bench are:—

1. What is the age of majority of a Hindoo resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil?

2. To what extent does Act XL. of 1858 have operation on persons resident in the town of Calcutta?

Having heard these questions argued by the Advocate-General, who appeared for the petitioner, we thought it advisable, before giving our opinion, to learn what rule has been followed by the Supreme Court, and afterwards by the High Court, since the passing of Act XL. of 1858, and before the decisions mentioned in the order of reference.

We therefore caused a search to be made amongst the records of the Court on the original side, and the result of it is this:—

In Keerut Chunder Sircar and others v. Hullodhur Ghose, a report was made by Mr. Justice Morgan on the 22nd of April 1863, finding that the infant plaintiff Bhoobun Mohun Ghose had attained his full age of sixteen years; and an order, dated the 6th of May 1863, was made discharging the next friend of the plaintiff, and allowed him to prosecute the suit.

In Denender Narain Roy and others v. Abhoychurn Sen and others, it having been proved by affidavit that the plaintiff had attained the age of sixteen years, an order was made on the 15th December 1863, discharging the next friend of the plaintiff, and allowing him to prosecute the suit.

In Anundgopaul Dutt *vs.* The Secretary of State, Mr. Justice Levinge made a report, dated the 30th January 1864, finding that the defendant Bhoobun Mohun Dutt had attained his full age of sixteen years, on

ich an order was made on the 25th Febru- 1864, directing the defendant's share of fund in Court to be paid to him.

In Anundo Lall Dutt and another *vs.* Sree- tty Monomohiny Dossee, an order was de on the 25th of August 1864, dis- rging the next friend of Anundo Lall Dutt, allowing him to continue the suit, as had attained the age of sixteen years.

In Monohur Doss and others *vs.* Bullub s and others, an order was made on the h of January 1867, discharging the Re- er as to Ram Kissen Doss's share of the perty, and directing his share to be deli- d to him, he having attained the age of een years. In the same suit, a like order made on the 10th of September 1868 as Radha Kissen Doss's share of the property, having attained the age of sixteen years.

In Pertaub Chund Sett *vs.* Takoordoss t and others, an order was made on the d of March 1871, discharging the Re- ver, and directing the plaintiff's share the property to be delivered to him, as had attained the age of sixteen years.

In Monmothonath Day and Onath Nauth *vs.* Aushootosh Day and others, a ort was made by Sir Charles Jackson on 24th of September 1862, which found that plaintiff Monmothonath Day had attained full age of sixteen years, and an or- was made on the 14th of June 1866, cting the arrears of maintenance and fu- maintenance to be paid to him out of fund in Court. In the same suit a report Mr. Justice Phear was filed on the 8th of gust 1866, finding that the other plaintiff ath Nauth Day had attained his full age of een years; and an order was made on the d of March 1867, directing the arrears maintenance and future maintenance to be d to him out of the fund in Court. Then, the same suit, an order was made dated 8th of August 1872, discharging the ceiver, and directing the property in his ds to be delivered and paid to the plaint-

On the 11th of May 1867, in the suit of ool Chunder Bose and others *vs.* Sree- tty Komulmonee Dossee and others, Otool under Bose having attained the age of een years, an order was made for the dis- rge of the next friend.

In Sreemutty Gobind Soonderry Dabee *vs.* m Chunder Gossain and Gopal Chun- Gossain, an order was made on the h of December 1871, discharging the rdian *ad litem*, Gopal Chunder Gossain ing attained the age of eighteen years.

In another suit, Sreemutty Unnopoornah Dossee *vs.* Bhoobun Mohun Newgy and others, an order was made on the 9th of September 1872 for the discharge of the next friend, the plaintiff having attained the age of eighteen years; and subsequently, in another case (In the Goods of the Hon'ble Prosono Coomar Tagore, deceased), on the 20th December 1872, on the statement that the guardian of the infants had declined to act further, and that one of the infants had attained his majority or age of eighteen years, an order was made that another guardian should be appointed for the other persons who were still infants.

It seems that, until the order of Mr. Justice Markby in the case of Kamikhaprasad Roy, the age of majority of a Hindoo resident in Calcutta was considered in this Court to be sixteen years. It does not appear that there was any argument upon the question before Mr. Justice Markby made the order which he refers to in his judgment in 5 Bengal Law Reports 517. In the argument reported in 7 Bengal Law Reports 609, an unreported decision of Mr. Justice Norman to the same effect is quoted, but the date of it is not given. In the case before Mr. Justice Phear, 7 Bengal Law Reports 607, the question was argued, and the decision reserved. This was in August 1871, from which time it seems that decision has been followed.

In considering the questions referred to us, we cannot overlook the fact that, for more than ten years after the passing of Act XL. of 1858, the Judges of this Court, sitting on the original side, did not consider that it had made any alteration in the law administered by this Court on its original side as to the age of majority of Hindoos, which had been held in the Supreme Court—Nocoor Bysack *vs.* Gopaul Chunder Seal, Morton's Reports, p. 82,—to be 16 years.

And no doubt this view of the law must have been frequently acted upon during those years, and many titles to property in Calcutta must depend upon it. However great the inconvenience which would arise from our coming to a decision invalidating those titles might be, we should be bound to do so, if the construction of the Act were clear; but if it is doubtful, this inconvenience may be a reason for following what we may regard as the contemporaneous exposition of the Act.

The question depends upon what is meant in section 26 by the words: "For the pur- "poses of this Act, every person shall be held "to be a minor who has not attained the age

" of 18 years " The title of the Act is " An " Act for making better provision for the care " of the persons and property of minors in " the Presidency of Fort William in Bengal." If we looked only at the title and section 26, we might say that the town of Calcutta was within the purposes of the Act, it being included in the Presidency of Fort William. But the title of an Act, although it may sometimes aid in the construction of it, is not a safe expositor of the law, being often losely and carelessly inserted. And there is the established rule that, in the exposition of Statutes, the intention is to be deduced from a view of the whole and of every part taken and compared together.

The general statement in the title and preamble of the Act is not sufficient to show what are its purposes. We must look for them in the provisions which are made in it. The purpose is stated generally in the 2nd section, *viz.*, the subjecting to the jurisdiction of the Civil Court the care of the persons of all minors (except European British subjects) and the charge of their property, except proprietors of estates who have been or shall be taken under the protection of the Court of Wards. The sections which follow contain provisions for effecting this, and are followed by section 26. We think the word " purposes" there refers to the provisions in the preceding sections. Then section 29 defines the expression " Civil Court " as used in the Act, to be the principal Court of original jurisdiction in the district, and not to include the Supreme Court. Consequently none of the powers conferred by the Act could be exercised within the jurisdiction of the Supreme Court. The proviso that nothing contained in the Act should be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction was unnecessary, and seems to have been inserted from abundant caution.

We think the construction which was first put upon the Act—that it did not alter the Hindoo law in Calcutta as to the age of majority—was the right one; and that such a change was not intended by the legislative authority when the Act was passed.

If it is desirable that the law should be uniform in Calcutta and the mofussil, it may be made so by the Legislature without affecting existing titles, which must be affected by a decision of this Court, as we should declare what the law has been since the passing of Act XL. of 1858. As to Mr. Justice Phear's reason that we ought not to attribute to the Legislature the intention to set up for the same persons two standards of majority—one to prevail in the mofussil, and the other in Calcutta—we think the answer is that two standards had been set up in the mofussil by Regulation XXVI. of 1793, and it was the state of the law until Act XL. of 1858 was passed.

It appears to us that the grounds upon which the Full Bench came to the decision* in 1 Bengal Law Reports, p. 49, do not apply to the questions before us.

We think the first question should be answered by saying that the age of majority in such a case is the end of fifteen years. The second question does not arise in the case, it being stated that the petitioner has no property in the mofussil. We will not undertake now to define to what extent the Act may operate when a person, resident in the town of Calcutta, has property in the mofussil.

The 18th December 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Alluvial Land—Possession—Issues—Onus Probandi.

On Appeal from the High Court of Judicature at Fort William in Bengal.†

Grija Kant Lahory Chowdhry

versus

Hurrish Chunder Chowdhry.

Appellant sued to recover a tract of chur land, parcel of his mouzah of Jogdash; defendant alleged the said land to be a parcel of his mouzah Ghoogumaree. About the year 1830, a large tract of land was diluviated by the river Chutol within the mouzahs belonging respectively to plaintiff and defendant; and after re-formation in 1837, a proceeding was taken by the plaintiff before the Magistrate, under which he was ordered to be put in possession of a considerable tract of such newly-formed land, the Magistrate laying down the boundaries. After nearly 12 years (*i. e.*, in 18[illegible] respondent's father brought a civil suit to set aside the Magistrate's decision, and the ultimate finding was that appellant had been in possession of the land described in the Magistrate's order from and since the date of that order:

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* 10 W. R., F. B., 36.

† From the judgment of Bayley and E. Jackson, JJ., in Regular Appeal No. 392 of 1864, decided [illegible] December 1865.

LD that that decree must be taken to have esta-
d that the plaintiff was in possession of the land
bed in the Magistrate's order, and had continued in
possession; the question in the present suit being
er the lands now claimed are identical with those
cribed:

LD that that issue lay upon the plaintiff, because
ndation of his suit was that, having been in pos-
n, he was dispossessed as a consequence of certain
rements made by Government officers:

LD that plaintiff had failed to sustain the burden
of. He relied principally on the boundaries given
Magistrate and certain maps prepared then and
as compared with the Government map of 1853;
eir Lordships were unable to place firm reliance
any inference drawn from these maps. Their Lord-
were also of opinion that, in questions of this kind,
the natural boundaries and landmarks have disap-
d, evidence of possession was very important and
ctory, and that there was no reason to distrust the
ses of the respondent proving such possession.

this case the appellant brought his suit
ecover a large tract of chur land, which
claimed as parcel of his mouzah of
dash. The defendant is the zemindar of
mindary which includes a mouzah called
ogoomaree, and he asserts that the piece
hur land claimed by the plaintiff is parcel
is mouzah Ghoogoomaree. The single
tion in the case is—parcel or no parcel,
ther this land belongs to the plaintiff's
zah Jogdash, or the defendant's mouzah
ogoomaree?

The opening of this appeal by the learned
nsel, Mr. Leith, presented a simple and
rently consistent case in favor of the
ellant. It seems that about the year
, a large tract of land was diluviated
the river Chutol within the mouzahs
nging to the plaintiff and the mouzahs
nging to the defendant—and that, after a
ormation of some part of it in 1837, a
ceeding was taken under Act XV. of
4 by the plaintiff before the Magistrate,
er which he was ordered to be put in
ession of a considerable tract of such
ly-formed land. It was declared by the
ion of the Magistrate that he was to have
ession of that land; and the Magistrate
down the boundaries in this way: "By
papers of the nutthee, the boundaries
mouzahs Jogdash, Singhessur, and
sh-Maluncha are found to be situated
follow: A canal to the east of mouzah
gdash running from east to west; Dao-
ba, *i. e.*, the river Chutol, to the south,"—
it may be observed here that this has
ed out to be a doubtful boundary, be-
e there were two channels of the river
tol,—"the house of Mothura Moody
the east, and a dry branch to the west;
d the culturable lands of Murad Numdul
situate to the west of mouzah Singhes-
r."

That decision having been given, there is some evidence that the appellant was put into possession of the land so described. After a period of nearly twelve years, *viz.*, in 1849, the respondent's father brought a suit in the Civil Court to set aside the order of the Magistrate. The reason of the suit was, as stated in the plaint, a fear that that decision of the Magistrate might be used to disturb the respondent's father in the possession of land which clearly belonged to him. The result of that suit, in which final judgment was given in 1852, was in favor of the appellant. An issue was raised in it as to the fact of the actual possession of the land from the time of the Magistrate's order; and upon that issue, the ultimate finding was that the appellant had been in possession of the land described in the Magistrate's order from and since the date of that order in 1837. The issue as to possession was distinctly raised, and distinct and explicit judgment given upon it. Their Lordships are of opinion that the parties are precluded by that judgment from now averring that the appellant was not in possession of the land described in that decree from the time when the Magistrate's order was passed in 1837 up to the time of the suit of 1849. So far the plaintiff's case is clear. That decree must be taken to have established that the plaintiff was in possession of the land described in the Magistrate's order, and had remained in such possession. The question in the present suit is whether or not the lands which are now claimed by the plaintiff are identical with the lands so described.

Now, undoubtedly, that issue lies upon the plaintiff, because the foundation of his suit is that he, having been in possession of the land, was, shortly after the decree of 1852, dispossessed of it by the respondent, as a sequel or a consequence of certain measurements which had been made by the surveying officers of the Government, which resulted in the lands being measured into the respondent's mouzah of Ghoogoomaree. The proceedings on that survey appear to their Lordships to be entitled to considerable weight. The Government officers, of course, went on the ground, and, when on the ground, endeavoured to ascertain the boundaries as they had been laid down in the Magistrate's order. It appears that the appellant had first obtained from the surveying and measuring officers a measurement of the land now in dispute into his mouzah of Jogdash. There was then a complaint made by the respondent to the superior officer of that measure-

ment, and other officers were sent down to ascertain whether the first measurement had been properly made or not; and after conflicting reports from two officers successively sent upon the land, the appellate tribunals from them decided in favor of the report of the first officer, namely, that this land belonged to the respondent's mouzah of Ghoogoomaree. The report of the surveying officer who decided in favor of the appellant is very explicit on the point of possession. He examined witnesses, and he came to the conclusion that the land then and now in dispute had been for many years in the possession of the respondent, and he declared himself to be unable, upon the ground, by a comparison of the maps with any landmarks that he could find there, to ascertain that the land then and now in dispute formed a part of that described in the Magistrate's decision. Mr. Leith pointed out that that report was not entitled to great weight, inasmuch as the officer had mistaken the position of the river Chutol; and there is undoubtedly force in that observation; still their Lordships cannot but think that in a question of this kind, where so much must depend upon local investigation, the opinion of that officer, confirmed by his superior officers, is entitled to great weight. It must be remembered that the appellant had first obtained the measurement in his favor, and therefore that the officer was called upon to displace that which had been already done; and it certainly would appear from his report that he had, at all events, endeavoured to execute his duty carefully, for he made a full and long report, going into the circumstances of the ground, the appearances which it exhibited, and giving reasons, and very full reasons, for the opinion at which he arrived. These measurements having been made, this land was assigned to the respondent's mouzah. This was in the year 1852. The appellant avers that, at that time, or about that time, he was dispossessed by the respondent. If he were so dispossessed, he certainly did not take very prompt measures to obtain redress; for, although then, as he alleges, dispossessed of what he now contends he had been for many years in possession of, he takes no step to reverse what had been done by the measuring officers until the year 1859, when the suit is commenced.

In this suit, which has been brought by the appellant to annul the orders of the measurement officers, and for possession, the inquiry as to the identity of the lands has been fully gone into, with the result that the Principal Sudder Ameen found in favor of the appellant; but his judgment was reversed by the High Court.

Their Lordships have felt the extreme difficulty of arriving at a decision satisfactory to their own minds in this case. The appellant has relied, and principally relied, upon the boundaries which are given in the decision of the Magistrate, and upon the map, called the sketch-map, prepared at that time, and also upon a map which was prepared in the year 1851; and by comparing those maps with the Government map of 1853, he has endeavoured to establish the identity of the boundaries described in the Magistrate's decision with the lands which are now in dispute. It was difficult for those who went on the ground to ascertain, by these means, the boundaries which the Magistrate's decision had pointed out. Indeed, they were unable to do so. The difficulty is certainly not less when the comparison has to be made, not upon the land itself, but with reference to a map which—assuming it to be a correct representation of the ground—is on a very small scale, and does not contain one of the important landmarks upon which the appellant relies, *viz.*, the canal to the north, which forms the northern boundary. As far as their Lordships were able to conjecture from an examination of the maps, there was a great deal to support the contention that a portion of the chur in question was in the situation or near the situation which was contended for on the part of the appellant, and that it was not to the south of that which was asserted by the appellant to be the Chutol stream. But no firm conclusion can really be drawn from such an examination. The maps prepared in India by the native authorities are extremely unsatisfactory. The sketch-map has straight boundaries which cannot exist naturally upon the ground; it marks a square block, and gives very few bearings beyond it. Their Lordships, therefore, have felt that they cannot place such firm reliance upon any inference to be drawn from these maps as to satisfy them that they would do justice between these parties by assenting to the conclusions which the appellant draws from them.

The great strength of the arguments on the part of the appellant has been drawn from the maps; and the important element on which the defendant mainly relies, *viz.*, the evidence which was given as to the actual possession of this land, was not only not repelled by any anticipatory argument on

d

e part of the appellant, but in the open-g of the case that evidence was not adverted further than that the learned Counsel told the number of witnesses, and pointed out e pages where the evidence might be found. n coming to the respondent's case, their ordships must observe that this evidence me upon them with rather sudden force. here is a great body of it, and great consis-ncy in it. It shows, if it is believed, that, om the time when the chur land now in spute was formed, the respondent and his ther were in possession of it. The witnesses ho were called were tenants who had paid nt, and other persons who knew the land; me of them, who knew it before it was sub-erged, say that it was the land which longed to the village of Ghoogoomaree.

The evidence of possession on the other de is extremely slight. It was pointed out Mr. Doyne that no witnesses were called ho had ever lived upon this particular land, d those who were called came principally om Joneally, a place beyond the southern ream of the Chutol.

In questions of this kind, where the natural oundaries and landmarks have disappeared, here there are no fences to mark what is e extent of the property, evidence of pos-ssion is very important and very satisfac-ry. Their Lordships, on looking at this idence, see no reason to discredit the wit-sses for the respondent. The Principal dder Ameen has apparently disregarded e testimony altogether; but he has given reason for so doing, and afforded no istance to those who have to consider the ight to be attached to the witnesses. If e Principal Sudder Ameen had found that witnesses were not entitled to credit, eir evidence might be disregarded; but ere is no intimation whatever that these tnesses are not speaking the truth; and they are speaking the truth, then it is plain t the respondent has been in possession this ground, or of parts of it, ever ce it became habitable or culturable after e waters had subsided. Assuming then t there is evidence which can be relied on that the respondent has been long possession of the land now in dispute, e effect of it upon the judgment, which ght to be given in this case, appears to eir Lordships to be very strong. An toppel must be mutual, and both parties ust be bound by the finding in the decree 1852. Now, assume that the appellant in possession from the date of the Magis-te's order of the ground described in it up to 1852, as conclusively found by the decree in that year, and also supposing the conclusion is right that the respondent has always been in possession of the land now in dispute, the consequence is inevitable that the land now in dispute, of which the respondent has been in possession, is not the land described in the suit of 1852, of which, on the hypothesis, the appellant has been in possession. The appellant has, in truth, given no satisfactory evidence that he was really in possession of the land now in question.

Again, if the appellant had been in possession of the land now in dispute, and had been dispossessed, the mode of dispossession might have been shown; and it is reasonable to expect that, if there had been an actual dispossession, it could have been shown. Proof of actual dispossession would have greatly helped to establish the fact of a real possession capable of being so disturbed. But the manner of the alleged dispossession is left entirely unexplained. That there was a constructive dispossession, as the result of the action of the measuring officers, may be clear, but no actual dispossession is at all shown by the evidence.

There are other circumstances in the case which also weigh against the appellant. The quantity of land the appellant now claims is larger than that which was found for him by the judgment of the Court in 1852. The judgment finds that the mouzah of Jogdash contained 50 or 60 khadas of land. The plaintiff now claims 71 khadas out of 250, of which he says his mouzah Jogdash consisted. There has been a question whether the Judge, in saying that the mouzah Jogdash was composed of 50 or 60 khadas, was not speaking of the cultivated land only, and whether there was not beyond the cultivated land a portion of chur land which he did not mean to include in that quantity. But, upon looking at his judgment, it is by no means clear that he did not mean to describe the whole quantity which belonged to the mouzah, and that, in fact, he was not describing the entire mouzah. The inference would rather be that he considered the 50 or 60 khadas as the total quantity of which the mouzah consisted. If this be so, in the claim which the plaintiff now makes, he has exceeded the quantity which was declared to belong to him, wherever it was, by the decision of 1852.

It is also to be observed that, with regard to the nature and quality of the land, there is considerable difficulty in the appellant's case. The land with which the Magistrate's

order of 1837 dealt appears to have been at that time inhabited and cultivated land. It is singular that, if the land now claimed be the same as that which was the subject of that order and the former suit, it should have degenerated between 1837 and 1864, when the Ameen sent down by the Court in this suit surveyed it. He describes it as at that time sparsely inhabited by two or three Mahomedans only, and destitute of habitations and trees. It is a description of the land extremely different from that with which apparently the Magistrate was dealing, and affords some indication that the land, now in dispute in the present suit, is not identical with the land which was the subject of his order and the decree in 1852.

Their Lordships do not think it necessary to go minutely into the evidence. They are perfectly aware of the difficultv of arriving at a decision in cases of this kind—where the boundarjes shift, the rivers change their course, and where nothing naturally on the ground, or artificially placed there, remains in the same state, so that old descriptions can be followed and compared. They were desirous, in order that complete justice might be done, that, if there was any real doubt whether sufficient care had been exercised in ascertaining the rights of the parties, a further inquiry should be made. But upon a suggestion of that kind being made, the Counsel on both sides pointed out that there would be considerable expense, great prolongation of this already protracted litigation, and, after all, difficulty, perhaps insurmountable, in discovering exactly where the lands were. Their Lordships, therefore, have felt, upon consideration of all the circumstances of this case, that they best exercise their own duty, and, really, best consult the interests of the parties, by arriving at a decision which will put an end to this litigation, which has been for so many years going on between these parties.

On the best opinion they can form upon the materials before them, their Lordships have come to the conclusion that the appellant, upon whom the burden of proof lies, has failed to sustain it. He has not satisfied their Lordships that the land he now claims is identical with that of which he was put into possession by the Magistrate's order, and, consequently, has failed to establish his right to obtain possession of the land, and to reverse the orders of the surveying officers.

Their Lordships desire to say that they do not concur in all the reasons which were given by the learned Judges of the High Court for their judgment. They think they did not give sufficient effect to the decree of 1852 as a conclusive judgment upon the possession of the land then in dispute; but whatever the effect to be given to that decree the High Court came to the right conclusion that the plaintiff had failed to establish his right to the land he now claims.

They also desire to express their satisfaction that their present decision will establish the title of the respondent in accordance with, as they believe, the long and actual possession of the land itself. They think that, if the evidence of possession stood alone and they had to determine the case upon the issue whether the appellant or the respondent had been in possession of this chur land since its re-formation, their verdict must have been in favor of the respondent.

Their Lordships are of opinion that substantial justice will be done by the conclusion at which they have arrived; and they will humbly advise Her Majesty to affirm the decree of the High Court with costs.

The 19th December 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Conveyance—Factum and Bona Fides—Plaintiff's Evidence—Admission.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Mussumat Ushrufoonnessa Begum

versus

Baboo Gridharee Lall.

In a suit to recover possession, with mesne-profits, of property alleged to have been purchased by plaintiff from one A, where defendant U was a daughter of A's sister R, who claimed the property through her son V, the question was whether plaintiff had obtained the property by a valid deed of sale.

Plaintiff was a pleader, and, while a suit was in progress in which, on behalf of his step-mother and another client, he contended that V had no property at all in the mouzah, he obtained a conveyance from A whose sole title was derived from V, which conveyance nominally made to S T was never asserted by plaintiff till seven years later when he commenced this suit. The evidence for the payment by plaintiff of the considera-

* From the judgment of Kemp and E. Jackson, JJ., in Regular Appeal No. 78 of 1867, decided 12th February 1868.

money was so unsatisfactory that the High Court moned the plaintiff and examined him :

LD that it was somewhat dangerous to allow tiff, a professional man, who did not give evidence own suit in his own behalf, to be called for the ose of supporting his case which had broken down ; plaintiff's evidence as to payment of the consider- money was very unsatisfactory and at variance his previous deposition ; and that, though the mere of the deed was proved, it was not a *bonâ-fide* veyance :

LD that the circumstance of U having, in a previ- suit, admitted the execution of the deed, did not ade her from contesting its validity, and maintain- that it was colorable, not real.

THIS was a suit instituted for the recovery possession of a certain portion of the ok called Umbai, together with mesne- its.

The case of the plaintiff was, that he chased this portion of the talook on the h of August 1859 from one Mussumat eemun. In order to make the case intel- ble, it is as well to observe that Azeemun a sister of Mussumat Khairoonessa; that ssumat Khairoonessa claimed this proper- through her son Velayet Hossein ; and that defendant Ushrufoonnessa was a daughter Khairoonessa, and a sister consequently Velayet Hossein. There was a ques- n whether Khairoonessa obtained this perty from Velayet Hossein by devolu- n or by a deed executed by him ; but it is admitted that she must, for the pur- es of this suit, be taken to have obtained by a deed. And indeed some other ques- ns which were raised seem now to have en disposed of, leaving the sole question the cause whether or not the plaintiff ob- ned this property by a valid deed of sale m Azeemun.

The circumstances under which this deed sale was made may be shortly stated to these. The plaintiff is a pleader, and, on e 15th of February 1859, he had instituted suit on behalf of one Ameeroonessa, who s a representative of Belkeesoonessa, and a dy of the name of Parbutty, his own step- ther, against Ushrufoonnessa, as the heiress Velayet Hossein; in which suit he en- avoured to establish that Velayet Hossein d no title whatever to this property, the roperty having been altogether bought by e money of Belkeesoonessa, who was the fe of Velayet Hossein. It appears, there- re, that while a suit was in progress, in hich, on behalf of his step-mother and other client, he contended that Velayet ossein had no property at all in this mouzah, e obtained a conveyance of a portion of the ouzah from this lady Mussumat Azeemun, hose sole title was derived from Velayet ssein. It is also an undisputed fact in the case that this conveyance, being nominally made to one Sunt Lall, was never asserted by the plaintiff until seven years after, when he commenced this suit, to have been, in reality, made to him ; but he seems, according to his own showing, to have concealed the case which he now sets up.

Their Lordships have perused and considered the evidence of the witnesses who were called for the purpose of proving the execution of this deed and the payment of the consideration-money, for it is to be observed that the plaintiff in this case has not merely the burden of proving the execution of the deed, he has to prove further that Sunt Lall was really his own benameedar, and that he advanced the money which was duly paid to the vendor. The evidence of these witnesses their Lordships consider altogether unsatisfactory. As far indeed as the execution of the bill of sale is concerned, from other evidence their Lordships have come to the conclusion that it was, in fact, executed ; but as for the payment of the consideration-money, if it rested alone on the evidence of these witnesses, their Lordships would not rely upon it. That appears to have been the view of the Principal Sudder Ameen who dismissed the suit ; and that appears also to have been the view of the High Court, for they appear to think the evidence below of so unsatisfactory a character as to make it necessary that they should exercise the power, which undoubtedly they possess, of summoning the plaintiff before them and examining him.

Their Lordships cannot help here observing that in a case like this it does appear to them somewhat dangerous to allow a plaintiff, a professional man, who has not thought fit to give evidence in his own suit in his own behalf, upon the failure of evidence which he has adduced, to be subsequently called for the purpose of supporting the case, which had broken down. The High Court undoubtedly attached credence to the evidence of the plaintiff ; but upon that subject their Lordships are unable to concur with the view taken by the High Court. As far as the payment of the consideration-money is concerned, which is necessary to support the reality of this transaction (for the question really comes to this—was it a real transaction or was it a colorable one ?), the evidence of the plaintiff appears of a very unsatisfactory character. He does not speak at all directly to the payment of it, but says that he procured it, that he sent it; he speaks of an agreement as to the purchase-money

having been made with the son of the Mussumat; and at the last, when questioned by the Court, he says that he saw the lady coming back in her carriage which he had sent for her, and he saw the bag of money in her hand before her as she was going away. That is an account which does not appear to their Lordships of a very satisfactory character.

But their Lordships have been referred to a deposition of this witness made about a month after the occurrence of the transaction, which it appears very material to consider. It should be observed that in his last examination he lays the scene entirely at the godown of Sunt Lall, the nominal purchaser. He represents that he saw the transaction from his own house, which was at some distance from it, and he represents the transaction to have been entirely his own; and, as far as would appear from his last deposition, Mosaheb Khan, to be hereafter referred to, had nothing whatever to do with it. It appears that he was examined on the 21st of September 1859. His examination was taken in a proceeding of this kind. The present plaintiff, Mussumat Ushrufoonnessa, brought a criminal charge against Mosaheb Khan, her own mookhtear, for various acts of alleged malversation, one of which was the obtaining this very deed from Azeemun to Sunt Lall; and in the course of this case Gridharee Lall is called as a witness, seemingly for the prosecution. The account he gives of the transaction in substance is this. On it being put to him whether he knew of any collusion between Mosaheb Khan and Azeemun, he says: "I do not know whether "the aforesaid Mussumat had made the sale "in the name of Sunt Lall in collusion with "Mosaheb Khan or not;" the notion in the mind of Ushrufoonnessa at that time appearing to be that there was collusion between Azeemun and Mosaheb Khan. The question does not point to her having suspected Gridharee Lall of having had anything to do with it at that time. He says, he does not know whether this sale was made in collusion with Mosaheb Khan, but he says, "on the day the sale was made, Mosaheb "Khan also went to my house along with "the said Mussumat;" and he subsequently says, "on the day of the sale the aforesaid "mookhtear went to my house to make the "conveyance." Now, this does appear an entirely different story from that which he told before the High Court. If his story told before the High Court were true, he could have had no difficulty whatever in answering the question with respect to the collusion of Mosaheb Khan and Azeemun. His answer would have been, "there was no collusion whatever "between Mosaheb Khan and Azeemun. "Mosaheb Khan had nothing to do with the "transaction. It was entirely my own; I "bought the property; I sent the money. "It was conveyed to Sunt Lall entirely for "me, and Mosaheb Khan had nothing to do "with the transaction. There was, in fact, no "collusion with anybody." And one does not see why, if he were an honourable man and the truth were what he has told the High Court, he did not come forward when Mosaheb Khan was charged with fraud in connection with this transaction, and tell the story which he tells now. But so far from that, he does not give the slightest hint of the story which he now brings out for the first time in this suit, but he gives a totally different version of the transaction. He represents the scene to be a different one, namely in his own house instead of that of Sunt Lall; and he speaks of Mosaheb Khan as the party to the transaction, entirely concealing that he himself had anything to do with it.

Looking at the nature of the transaction at some of the admitted facts which have been before referred to, and to the two accounts which have been given by the plaintiff which appear to their Lordships to be at variance, their Lordships are unable to give credence to the latter account which has been given by the plaintiff; and in their opinion, he has not given that proof, which under the circumstances, he was called upon to do, of the genuineness of the transaction and of the payment of the money.

It is not necessary to speculate upon the precise nature of the transaction, their Lordships having come to the conclusion that it was a colorable one. It may be, as has been suggested in some proceedings in the cause, that some parties, Gridharee Lall among them, may have thought it convenient or useful for the purposes of the litigation to obtain a conveyance from Azeemun to Sunt Lall. They may have thought it more convenient to put him forward as the party possessing the property than her; and further it may have been their object to obtain a more complete control over the suit by having the property in his name than they would have had if it had been in hers. But, whatever be the real nature of the transaction, their Lordships are of opinion that the plaintiff has failed to establish a *bonâ-fide* conveyance to himself for value.

It only remains to notice one or two obser-
ions which have been made on the part of
Counsel for the respondent. It has been
gested that, inasmuch as Azeemun has not
pealed, therefore it is not open to Ushruf-
nessa to contest the validity of this deed
may be that Azeemun might, if she had
sen, have been able to avail herself of
tain equities against the plaintiff, which it
uld not be open to Ushrufoonnessa to do;
their Lordships are of opinion that it is
n to Ushrufoonnessa to contest the
idity of the transaction, and to maintain
it is colorable, not real. It has also
n contended that the effect of some other
ceedings has been to establish an admission
the part of Ushrufoonnessa of the validity
this deed. The proceedings relied upon
fly are a suit which she instituted against
emun and Sunt Lall for the purpose,
ng other things, of setting aside this deed,
case then being that she obtained the
perty from her mother by a tumlicknama
cuted upon her mother's death-bed, and
, therefore, Azeemun could have nothing
dispose of. That suit was finally decided
inst her upon the ground that this
licknama, alleged to have been given by
mother upon her death-bed, was not valid;
that does not, in their Lordships' opinion,
pose of the validity of the deed. The
t that can be alleged is that in that suit
hrufoonnessa admitted the execution of
deed. Their Lordships are of opinion
, as far as that part of the case is con-
ned, it must be taken that she did admit
actual execution; and, indeed, upon other
unds—among others, the fact of the
istration of this deed—their Lordships are
pinion that the mere *factum* of the deed
roved. But, for the reasons which they
e given, they have come to the conclu-
that this was not a real transaction, and
the property was not *bonâ fide* con-
ed, and, therefore, that the decree of the
h Court must be reversed.

Under these circumstances, their Lordships
humbly advise Her Majesty that the de-
of the High Court be reversed, and that
decree of the Principal Sudder Ameen
affirmed, with costs.

The 20th January 1873.

Present:

e Hon'ble Louis S. Jackson and Dwarka-nath Mitter, *Judges*.

High Court Rules—Paper-book—Accounts.

Case No. 113 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 24th February 1871.

Madhub Pershad and others (Plaintiffs), *Appellants*,

versus

Fool Coomaree Bibee and others (Defendants), *Respondents*.

Baboos Nil Madhub Bose and *Jadub Chunder Seal* for Appellants.

Baboo Annoda Pershad Banerjee for Respondents.

Under the rules of the High Court, account-books, which are not translated, and are not, therefore, a part of the paper-book, cannot be referred to in a trial without special leave.

Jackson, J.—THIS case appears to be so clear that we think it unnecessary to call upon the vakeel for the respondent. The principle on which this case appears to have been decided has been fully settled by the decision* of the Privy Council affirming a judgment of this Court in the case of Fool Coomaree reported in 7 Weekly Reporter, page 67. The plaintiff, appellant, relied upon a so-called stated account in respect of which he gave evidence in the Court below. The evidence on that point entirely broke down, and nothing has been laid before us to-day which induces us to believe that the lower Court came to an erroneous conclusion on that point. On the one hand, it is admitted that the evidence on the side of defendant is equally balanced by that adduced by plaintiff to prove the adjustment, and, on the other hand, we have the strongest possible case of an *à priori* improbability in this part of the case set up by plaintiff, the plaintiff being beparee and the defendant ourutdar; that, there being an outstanding balance of account extending over a long period of time, and involving large sums of money, the defendant allowed herself to be bound by an adjustment arrived at in the office of the plaintiff upon the plaintiff's own books and on some "stitched papers" of the defendant—not committed to writing or signed by the parties mutually, but merely entered by way of memorandum by

* 14 Moore's Indian Appeals, p. 13.

each party in his own books. We think, therefore, that the Court below was perfectly right in disbelieving the allegation of such stated account.

It is then urged that, even if there were no such stated account, yet several, if not all, transactions out of which the defendant's liability arises took place within three years of this suit. On inquiry the number of such transactions comes down to four. We are referred to the evidence of one of plaintiff's witnesses, Ram Pershad Naik, who is said to prove directly the transactions in question, and we are asked to allow reference to be made to the plaintiff's account-books, which are not translated, and are not, therefore, a part of the paper-book. Under the rules of the Court these account-books could not be referred to, under the circumstances, without special leave. No ground for according special leave has been stated; nevertheless, if it appeared to us that the interests of justice required it, we should be very sorry to refuse compliance with the request; but it turns out that the so-called direct evidence, which is sought to be corroborated by reference to the books, is nothing more than a statement of Ram Pershad made by him on reference to those books. The witness appears to have had no personal knowledge of the facts he mentions, but he merely deposes to them as he finds them in the books. That being so, the plaintiff clearly fails to prove that any of the transactions, on which the defendant could be made liable, occurred within three years of this suit. The suit is therefore barred by limitation. The appeal is therefore dismissed, and the judgment of the lower Court affirmed with costs.

The 21st January 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Summary Orders—Reg. I. of 1798—Appeals—Act XXIII. of 1861, s. 38—Miscellaneous Cases.

Case No. 286 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 6th September 1872.

Hureenath Koondoo (Opposite Party), *Appellant,*

versus

Modhoo Soodun Saha and another (Petitioners), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

No appeal is provided from a summary order mad by a District Judge under Reg. I. of 1798; but su order is open to question in a regular suit.

Act XXIII. of 1861, s. 38, gives no right of appeal such cases, but merely provides that the mode of tri and the procedure incidental and ancillary thereto, l down in the Civil Procedure Code, shall be appl throughout in miscellaneous cases and proceedings.

Jackson, J.—We think the preliminar objection taken in this case must prevail, viz that, in summary orders made by the Distri Judge under Regulation I. of 1798, appeal is provided. The appellant's vake relies on section 38, Act XXIII. of 186 which provides that the procedure prescrib by Act VIII. of 1859 shall be followed, far as it can be, in all miscellaneous cases a proceedings which, after the passing of t Act, shall be instituted in any Court. Th it is contended, gives, amongst other thin a right of appeal in all miscellaneous ca and proceedings whatever by taking t section in combination with section 23 of t same Act. It appears to us, however, t this construction is altogether strained. A that is said in section 38 is that, in tri and investigations in miscellaneous ca and proceedings, the procedure, that is, t mode of trial and the procedure incide and ancillary thereto, laid down in the C Procedure Code, should be applied throu out those cases and proceedings. We m observe also that, if the construction p forward is correct, it was quite superflu in subsequent enactments, such as the Indi Succession Act, to make express provisi for appeals. If Baboo Romesh Chun Mitter's argument is correct, such an app would be allowed by the general terms section 38. My learned brother reminds that the word "decrees" in section 23 ref to decrees passed by the Court of origi jurisdiction in regular suits, and that, unl questioned in appeal, decrees so arrived at binding and conclusive in questions of between the parties to the suit; but matter on which the present case turns

not a final and conclusive determination of a question of title; it is what used to be called a summary order which is open to question in a regular suit.

The objection, therefore, is allowed, and the appeal dismissed with costs.

The 23rd January 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

British Burmah—Jurisdiction—Royal Grants—Acts of State—Confiscation—Act VIII. of 1859, s. 191—Alternative Damages.

Case No. 67 of 1872.

Regular Appeal from a decision passed by the Recorder of Rangoon, dated the 8th January 1872.

The Bombay-Burmah Trading Corporation Limited (Defendants), *Appellants,*

versus

Mirzah Mahomed Ali Sherazee (Plaintiff), *Respondent.*

The Advocate-General and *Mr. Woodroffe* for Appellants.

Messrs. Evans and *Macrae* for Respondent.

In a suit brought in a British Court in Burmah to recover possession of timber alleged to have been obtained under a grant from royal authority, but taken from plaintiff's possession by defendant without color of right, and in collusion with the Burmese Governor of Ninghan, where in defence an act of state was set up, and it was contended that the person through whom defendant had taken possession was the foreign local authority, and that a Court of British India was not entitled to inquire into the character of that act:

HELD that the Court was bound to see whether the act relied upon was one of the character claimed for it, and that, in the present case, it was in express contravention of the royal mandate, and destitute of the characteristics of an act of state:

HELD that the placing of marks on the timber by the Governor did not amount to an act of confiscation:

HELD, too, with reference to the alternative damages awarded to the plaintiff, that it was unnecessary for the High Court to lay down the principle on which they should be assessed, and that, as defendants had, at their own risk, removed the timber from Tonghoo to Rangoon (where the suit was tried), the plaintiff was entitled to insist on delivery, or, in default, to recover the value of the timber, without any deduction on account of the charges incurred by defendants in removing the timber to that place.

Jackson, J.—WE think we can have no doubt as to what our decision ought to be on this appeal.

The plaintiff brought this suit in the Court of the Assistant Commissioner of Tonghoo to recover possession of certain logs of wood, which, he alleged, the defendants had, without color of right, and in gross collusion with the Burmese Governor of Ninghan, taken out of his possession in the foreign jurisdiction, and removed into British Burmah. It was alleged that the timber was then lying at Tonghoo. The defendants appear, notwithstanding the commencement of the suit, to have removed the timber further from Tonghoo to Rangoon, to which place they also contrived to have the suit removed, notwithstanding that nearly all the witnesses resided at Tonghoo, and had to be examined there under commission.

The defence set up by the defendants was that the defendants, and not the plaintiff, were entitled to work and bring out timber from the forest of Ninghan; that the logs of timber claimed by plaintiff had been acquired by defendants under purchase from the Governor of Ninghan in terms of an agreement made with the Governor; and that the 65 logs of timber had never been the property of the plaintiff. The defendants, also, during the progress of the suit, objected to the jurisdiction of the British Court, but this objection was overruled on the authority of a previous decision of the High Court.

The suit coming up for trial in the Court of the Recorder of Rangoon, issues were fixed, of which the first was, whether the plaintiff was entitled to recover from the defendants the 65 logs of timber specified in the plaint or the value thereof.

It is complained by the Advocate-General, and, we think, not without justice, that this issue was too vague and general in terms, but it has not been shown that the defendants were prejudiced by the vagueness. Each party was represented by Counsel and agents who thoroughly understood what case they had to make; and it does not appear that either party was precluded from adducing any evidence which he thought material to his case. The result was that upon the evidence the Recorder came to the conclusion that the timber was shown to belong to the plaintiff, and to have been, wrongfully and without right, taken by defendants, undoubtedly with the aid of the person who at that time held the office of Woon or Governor of Ninghan. Having come to this finding, the Recorder ordered possession of the timber to

be delivered to plaintiff, and in default of delivery of possession, that plaintiff recover from defendants Rupees 50 for each log, being the price of teak timber then prevailing at Rangoon.

On appeal before us, the defendants take several grounds, on the first of which the learned Advocate-General contends that the plaintiff has not made out his right to the timber in suit. It appears to us that the evidence on this point is overwhelming in favor of plaintiff. The plaintiff has made out the license, or rather the grant, which, he said, he obtained from the royal authority in Burmah, and has, we think, shown that the timber to which the suit refers was either cut or purchased by him from other parties during the continuance of that grant.

It is then said that the validity of the plaintiff's title depends upon the proof that he paid to the Burmese Government the amount stipulated in the grant. It seems to us that this is a matter on the proof of which the defendants are not entitled to insist, and that, even if they are so entitled, it has been sufficiently proved from the account put in by plaintiff, as well as by the parol evidence, that he had paid from time to time the amounts stated into the royal treasury, and it certainly does not appear from anything shown on the other side that the plaintiff was in any default on that account.

Then it is said that the defendants had, in fact, good title to this timber, having acquired it from the Governor of Ninghan who, in turn, had taken it out of the possession of plaintiff by an act of confiscation, which confiscation is relied on as an act of state such as a British Court is not competent to question. The learned Advocate-General contends that this defence of an act of state being set up on the part of his client, and it being shown that the person, through whom or by whose assistance the defendants had taken possession of the timber, was the foreign local authority—Governor or Woon—however oppressive or arbitrary or unjust the act of the said officer may have been, a Court of British India is not entitled to inquire into the character of that act, and must accept it as an act of state. We cannot, however, assent to this proposition. It seems to us that when the defendants set up as justification something which they call to be an act of state, the Court is bound to see whether the act relied upon is one of that character.

Here it is found that, so far from the act of the Governor of Ninghan being ratified by, or in conformity with, the will of the supreme authority in Burmah, it was in fact in expre contravention of the royal mandate, and to my mind it is destitute of all the characteristics which one might expect to find in any thing of an act of state. It does not appear that any sentence or official order was issued under which this spoliation, as we must call it, took place. So far from that, it appears that, in order to facilitate the acquisition of the timber by the defendants, the Governor commenced a series of illegal and oppressive acts towards plaintiff, and to use threats of charges alleged to have been preferred against him by Abdool Gunny, so as to compel him to leave the Burmese territory.

We are then told that the placing of marks on the timber by the Woon amounted to an act of confiscation. It seems to us, however, that it was not so. If the order of the Governor was not an act of state, and as we have already said it was not, no more was the imposing of the mark. We think that the plaintiff has made out his right to the timber, and that the defendants have wholly failed to establish the proposition on which they relied. Further, I may observe, as pointed out by my brother Mitter, that defendants in the written statement, never relied on or referred to the so-called act of state, and that, if they had done so, no doubt a formal issue would have been framed on that point and not only the defendants, but also the plaintiff, might have had the opportunity of producing evidence such as each party thought fit to adduce.

A further question then has been raised as to the amount of damages allowed to plaintiff in the suit. It has been a matter of complaint that the Court, in awarding the plaintiff alternative damages, has given him the gross value of timber then prevailing at Rangoon, without taking into consideration and making any deduction on account of the charges incurred by defendants in removing the timer to that place. The learned Advocate-General has invited us to lay down on this subject some general rule as to the principle on which such damages should be assessed. In the present case, we think it quite unnecessary that we should accept any such responsibility. The duty which the Court had to perform under section 191 of the Civil Procedure Code is clear: "When "the suit is for moveable property, if the de "cree be for the delivery of such property, it "shall also state the amount of money to be "paid as an alternative if delivery cannot be "had." Now, in a case like the present, the money to be paid as an alternative was mani

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lestly the value of the timber if that could be clearly ascertained. At the time of the bringing of the suit, the timber was at Tonghoo. It is stated, and no doubt truly, that the value of the timber at Tonghoo is considerably less than the value of the same at Rangoon. The carrying of the timber from Tonghoo to Rangoon by the defendants after the suit had been commenced, and after the defendants, therefore, had full notice that plaintiff had taken steps to recover his property, was entirely at their own risk. If the law had not provided, as it does in section 191, that the Court should state the amount of money to be paid as an alternative, the decree, no doubt, should have directed delivery of the specific porperty decreed to the plaintiff. Can it be said in that case that the Court ought to have ordered that, before delivery of the thing to the plaintiff, he, plaintiff, to reimburse the defendants the charges of bringing the timber to Rangoon? We think not. It must also be borne in mind that the difference between the value of timber at Tonghoo and at Rangoon is not simply made up of the charges incurred in the transport of it, but depends in a large degree upon the wider market at Rangoon, and the facility of sale. The defendants having, as is shown above, at their own risk, removed the timber from Tonghoo to the place where the suit was afterwards tried, we think the plaintiff is entitled to insist upon the delivery of it to him; and, in default of delivery, to recover the value of it; and although we quite assent to the proposition of the learned Advocate-General, that it is not the business of the Civil Court to inflict punishment on defendants taking motives into consideration, we must say that we have had sufficient experience of timber-suits from Rangoon, and in particular enough is disclosed in the facts of the present case, to make it no matter of regret that defendants should be made liable to pay heavy damages.

We think, therefore, that this appeal must be dismissed with costs.

The 31st January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Remand—Review—Mesne-profits—Principle of Assessments—Zemindar—Ryot.

Case No. 778 of 1872.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 15th April 1872, reversing a decision of the Subordinate Judge of that District, dated the 29th September 1871.

Nursingh Roy and others (Plaintiffs), *Appellants,*

versus

John Anderson (Defendant), *Respondent.*

Mr. C. Gregory and *Baboo Ram Chunder Mitter* for Appellants.

The Advocate-General and *Baboo Juggadanund Mookerjee* for Respondent.

A suit by a ryot having been remanded with a view to the assessment of mesne-profits on the principle laid down in 13 W. R., p. 37, if it was found that plaintiff had himself cultivated the lands before leasing them out to an indigo factory, the first Court, finding this to be the case, assessed the mesne-profits accordingly, *i. e.*, at the lowest rate deposed to by plaintiff's witnesses. The District Judge reversed the decision on the ground of a later ruling in 14 W. R., pp. 294 and 295:

HELD that the Judge ought to have followed the course indicated by the order of remand:

HELD that special respondent, if dissatisfied with the order of remand, ought to have applied for a review; and not having done so, he was not entitled to ask the Court to go behind that order, and consider whether it was wrong with reference to 14 W. R., pp. 294 and 295:

HELD that the later decision did not overrule the earlier one, but referred to a different case, *viz.*, that of a large zemindar entitled to rent only, and that the Full Bench ruling referred to in the later decision did not intend to lay it down that a party, who is himself a cultivator, is not entitled to recover the profits which he would have made out of the land by his own cultivation.

Kemp, J.—THIS case was remanded by Justices Kemp and Glover on the 6th June 1871.* The lower Court was distinctly told to find whether the plaintiff cultivated the lands in dispute himself before he leased them to the factory, and, if so, to apply in assessing the mesne-profits the principle laid down in the decision to be found in Volume XIII., Weekly Reporter, page 37. The Judge remitted the case to the Court of first instance. The Moonsiff found, indeed it was admitted, that the plaintiff, the ryot, had cultivated the lands in dispute himself before they were leased to the factory, and, applying the principle laid down in Volume XIII., Weekly Reporter, page 37, he assessed the mesne-profits at the lowest rate deposed to by the witnesses adduced by the plaintiff.

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* 16 W. R. 21.

On appeal by the defendant, the Zillah Judge, instead of obeying and carrying out the order of the Court, reversed the decision of the Moonsiff on the ground that the decision quoted in the remand-order from Volume XIII., Weekly Reporter, had been, in his opinion, overruled by a later decision to be found in Volume XIV., Weekly Reporter, pages 294 and 295.

We think that the Judge ought to have followed the course pursued by the Moonsiff who obeyed and carried out the order of this Court. The special respondent, if dissatisfied with the order of remand, ought to have applied for a review; and not having done so, he is not entitled to ask this Bench, one only of the Judges being a remanding Judge, to go behind the remand-order, and to consider whether that order was wrong with reference to the decision in Volume XIV., pages 294 and 295. The decision of the Bombay High Court, Volume VI., page 1, is exactly in point. But apart from this, we are of opinion that the Full Bench decision to be found in Volume IX. of the Weekly Reporter, which was referred to by the Judges who decided the case to be found in Volume XIV. does not apply to the case before us.

In the case before the Full Bench, the plaintiff was not, as in this case, a ryot cultivating a few beeghas of land, but a large zemindar, the Maharanee Inderjeet Kooer. She sued to recover Rs. 7,762-2-8 as mesne-profits, claiming them on this basis that the value of the indigo manufactured by the defendant in that case represented those profits. The Zillah Courts awarded to her Rs. 293-14. She appealed, and the Divisional Bench referred the question to a Full Bench. That Bench, looking to the peculiar circumstances of that case, held that the damages in that particular case ought to be assessed "upon what would have been a "fair and reasonable rent for the land, if the "zemindar, the plaintiff, had let them to a "tenant during the period of the unlawful "occupation by the wrong-doer."

In that case, Sir Barnes Peacock in delivering the judgment of the Court remarked: "That the risk incurred by the defendant in "that case in growing indigo, and the fact that, "if the crop was a good one, he was entitled "to have the expenses of cultivation as well "as the value of the risk deducted from the "value of the crop, must be taken into con-"sideration; that the plaintiff, the zemindar, "ought not to be compensated for risks "which she never ran, or for expenses "which she never incurred." Then, again, the Chief Justice remarked: "If the whole of "the indigo crops had been destroyed by "rain or other cause, the plaintiff would "not have been satisfied to give up the "fair occupation-value of the land, but would "have thrown the whole risk of the cultiva-"tion on the defendant." It was with reference to the exceptional circumstances of that case that the Full Bench passed their decision, but we think that it cannot be contended that the Full Bench intended to lay down as a proposition of law that a party who is himself a cultivator, as is the case of the plaintiff before us, is not entitled to recover the profits which he would have made out of the land by his own cultivation; and indeed this was the view taken by Justices Seton-Karr and L. S. Jackson in the case before the Full Bench, and subsequently by Justices L. S. Jackson and Markby in the case reported in Volume XIII., Weekly Reporter, page 37. A zemindar, like the plaintiff before the Full Bench, who is entitled to the rent only, and a poor ryot who cultivates and lives on the produce of a few beeghas, are clearly not in the same position.

The Judges, who decided the case to be found in Volume XIV., had the decision in Volume XIII. under consideration. They did not, and without a reference to the Full Bench they could not, have overruled the decision. They thought that in the case before the Full Bench "there was nothing to show "that the plaintiff in that case, had she not "been prevented from doing so by the defend-"ant, might not herself have cultivated the "land referred to in that suit."

Now, it is clear, as already shown, that the plaintiff in the Full Bench case was a zemindar claiming the large sum of upwards of Rs. 7,000 as mesne-profits, and it cannot be said that she was a person who, like the ryot in the case before us in which a few beeghas are concerned, "might have cultivated the land herself."

It is admitted for the special respondent that the amount of mesne-profits assessed by the Moonsiff is not objected to, but only the principle upon which it has been calculated.

In this view of the case, as the Moonsiff has carried out the order of remand which we consider to be a proper order, we reverse the decision of the Judge, restore that of the Moonsiff, and decree this appeal with costs payable by the respondent.

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The 5th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble J. B. Phear and W. Ainslie, *Judges*.

Management of Minor Widow's Property—Right of Suit—Adoption—Declaratory Decree.

Case No. 228 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 26th August 1871.

Mussamut Pearee Dayee (Plaintiff), *Appellant*,

versus

Mussamut Hurbunsee Kooer (Defendant), *Respondent*.

Mr. J. T. Woodroffe and *Baboos Annoda Pershad Banerjee* and *Hem Chunder Banerjee* for Appellant.

Mr. C. Gregory and *Baboo Mohesh Chunder Chowdhry* for Respondent.

There exists no right of suit to set aside an order of the Court which has jurisdiction, deciding that a will is not sufficiently proved, and vesting the management of a minor widow's property in her guardian.

No suit can be maintained for an order directing such widow to make an adoption.

The Court declined to make a declaratory decree, declaring such direction to be a valid direction.

Couch, C.J.—We think the appeal must be dismissed.

The plaint seeks that the plaintiff may be declared to be entitled to the management of the property by setting aside orders of the Court by which another person has been appointed manager. It also seeks for an order directing the widow, a minor, to adopt a son, according to her husband's permission.

With regard to the first part of what is asked for, the Court, which has the jurisdiction to determine who shall have the management of the property, has decided that the will under which the plaintiff claims to have the management is not sufficiently proved, and has ordered that the management shall be in the defendant as guardian of the widow. We think the plaintiff cannot bring a suit to set aside that order. It is different from a suit to establish a right to the property. This is a suit to deal with the management which has been already disposed of by an order of the Court which has jurisdiction by law to do so.

Then, with regard to the other part, whether the widow shall be directed to make an adoption, Mr. Woodroffe has not produced any authority to show that such a suit can be maintained. We think no suit of that kind can be maintained. The decision of Mr. Justice Mitter and Mr. Justice Paul* only amounts, we think, to this—that the obligation to adopt is of that nature that it ought to be allowed to be exercised by a minor who has arrived at sufficient discretion to do so, it is not subject to the law with regard to civil acts, such as entering into contracts.

Then it was argued that at least we might make a declaratory decree; we might declare that this direction was a valid direction. But we see no reason for making such a decree as that. It would be of no use whatever to the plaintiff to establish a right under it, the management of the property having been vested by a valid order in some one else. A declaration of this kind would not give effect to any right which the plaintiff has. Certainly this is not a case in which the Court ought, in exercising its discretion, to make a declaratory decree.

The appeal is dismissed with costs.

The 5th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble J. B. Phear and W. Ainslie, *Judges*.

Alluvial Land—Act IX. of 1847, s. 6.

Case No. 64 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 23rd December 1871.

Ram Jewun Singh and another (Plaintiffs), *Appellants*,

versus

The Collector of Shahabad (Defendant), *Respondent*.

Messrs. J. H. Branson and *R. E. Twidale* and *Baboo Aubinash Chunder Banerjee* for Appellants.

* 15 W. R., Civil, 548.

Baboos Annoda Pershad Banerjee and *Juggadanund Mookerjee* for Respondent.

The words, "land has been added to any estate paying revenue directly to Government," in Act IX. of 1847, s. 6, mean added to the estate as it is depicted on the survey-map.

Couch, C.J.—I CAN see no ground for distinguishing this case from that which was decided by myself and Mr. Justice Ainslie.* If there is any hardship, the matter should be dealt with by the Government. I abide by the judgment which I gave in the former case, and think that the appeal must be dismissed with costs.

Phear, J.—I agree with the decision of the Chief Justice and Mr. Justice Ainslie, which is reported in 18 Weekly Reporter, page 64. It appears to me that the words, "land has been added to any estate paying revenue directly to Government," mean added to the estate as it is depicted on the survey-map. It follows, therefore, in accordance with the decision to which I have referred, that the judgment of the Subordinate Judge was right, and the appeal should be dismissed with costs.

Ainslie, J.—I concur.

The 6th February 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Suit for Arrears of Rent—Appeal—Act VIII. (B. C.) of 1869, s. 108—Act X. of 1859—Jurisdiction—Act III. (B. C.) of 1870.

In the Matter of

Ram Soondur Banerjee and another, *Petitioners,*

versus

Doorga Churn Barui and another, *Opposite Party.*

Baboo Grish Chunder Mookerjee for Petitioners.

Baboo Rajender Missry for Opposite Party.

In a suit for arrears of rent instituted before Act VIII. (B.C.) of 1869 came into operation, where the claim was under Rs. 100, and the decision was by the Deputy Collector, the proper procedure was held to be that laid down in Act X. of 1859, and the appeal to lie to the Collector.

Where an *ex-parte* decree in such a case was transferred, under Act III. (B.C.) of 1870, to a Moonsiff's Court for execution, an application for re-hearing was held to lie not to the latter Court, but to the former.

Kemp, J.—THE petitioner states that Luchmun Barui and another sued the petitioner for rent in the Court of the Deputy Collector of Gurbettah, and obtained an *ex-parte* decree on the 18th March 1869: that this decree was transferred under the provisions of Act III. of 1870 to the Moonsiff of Bistopore for execution; that the petitioner applied to the Moonsiff for a re-hearing of the suit, who rejected the application on the ground that he had no jurisdiction. The petitioner then applied to the Deputy Collector, who re-heard the suit, and dismissed it. The plaintiff then appealed to the Zillah Judge, who set aside the decision of the Deputy Collector on the ground that when the decree had been transferred under Act III. of 1870 (B.C.) for execution to the Moonsiff's Court, the Deputy Collector had no jurisdiction to entertain an application for a re-trial, and that, consequently, his decree dismissing the suit was without jurisdiction.

The prayer of the petition is that this Court will set aside the decision of the Judge dated the 9th July 1872, on the following grounds:—

1st.—That the Judge was wrong in holding that the Deputy Collector had no jurisdiction to entertain an application for a re-trial.

2nd.—That even if it be held that the Deputy Collector had no jurisdiction, the Judge himself had none.

The suit was for arrears of rent of the years 1273, 1274, and 1275, and the total amount claimed was under Rs. 100. The suit was instituted and decided by the Deputy Collector before Act VIII. of 1869 came into operation. The procedure therefore under section 108 of that Act would be that laid down in Act X. of 1859, and the appeal would lie to the Collector, and not to the Zillah Judge—*vide* sections 153 and 155 of that Act.

It is also clear that the decree alone was transferred to the Civil Court for the purpose of execution. Any application in the suit as to a matter which might affect the decree, such as an application for a re-hearing had to be made, not to the Court to which the decree was transferred, but to the Court by which the decree was made, in this instance the Deputy Collector—*vide* Weekly Reporter, Volume XV., page 75.

* 18 W. R. 64.

We therefore hold, first, that no appeal ould lie to the Judge; and, secondly, that he as wrong in holding that the Deputy Col- ctor had no jurisdiction to re-hear the case. The rule must be made absolute, and the ecision of the Judge dated the 9th of July 872 quashed.

The 6th February 1873.

Present:

he Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

x-parte Decree in Rent-suit—Jurisdiction—Act III. (B. C.) of 1870—Act VIII. (B. C.) of 1869, s. 108—Limitation—Act X. of 1859, s. 54.

In the Matter of
Ajoodhya Ram Khan, *Petitioner*,

versus

Sreemunt Pal and others, *Opposite Party.*

Baboos Ashootosh Dhur and *Kumla Kant Sen* for Petitioner.

aboo Bhowanee Churn Dutt for Opposite Party.

n *ex-parte* decree for arrears of rent having been ed by a Deputy Collector, partial satisfaction was ted by attachment and sale of the lessee's property. e lessee died, and his sureties, who were jointly liable, ected to the decree on the ground that summons had been served on them. The Subordinate Judge ming that the case had been transferred to his Court r Act III. (B. C.) of 1870, set aside the decree, and a day for the re-hearing of the suit:

LD that the above Act would not apply, because, at ime of its commencement, attachment had issued: LD that, under Act VIII. (B. C.) of 1869, s. 108, the edure in such a case would have to be regulated by X. of 1859, under s. 54 of which the application to aside the decree was barred by limitation.

Kemp, J.—On the 13th of September 72, the petitioner obtained a rule calling on the opposite party to show cause why order of the Subordinate Judge of Mid- ore, dated the 3rd of August 1872, in the er of an *ex-parte* decree originally ined by Nowab Sidee Nuzir Ali Khan adoor, dated 3rd of August 1868, should be set aside. The opposite party has eared, and the case has been fully argued. appears that the Nawab obtained an *arte* decree in the Court of the Deputy ector of Midnapore against Sreemunt Pal and others, farmers and securities of Hoodah Pyekan, appertaining to the zemindaree of Midnapore, for arrears of rent amounting with interest and costs to Rs. 4,244-8. In April 1869, execution was taken out by the Nawab against all the judgment-debtors, but the property of the lessee Sreemunt Pal was alone attached. The execution-proceedings appear to have been struck off, but they were revived in September 1869.

Subsequently, or in September 1870, the petitioner, by virtue of a decree passed by this Court, became entitled, amongst other property, to execute the said decree of the Deputy Collector for arrears of rent. On the petitioner's application, his name was substituted as decree-holder for that of the Nawab, and in execution, Rs. 43 were recovered by attachment and sale of the lessee's property. The lessee died, and his sureties, who were jointly liable under the original decree, objected to its execution on the ground that the summons in the original rent-suit had not been served upon them, and they prayed for a re-hearing of the suit under the provisions of section 119, Act VIII. of 1859. Thereupon, the Subordinate Judge of Midnapore, assuming that the case had been transferred to his Court under the provisions of Act III. of 1870, on the 3rd of August 1872, set aside the *ex-parte* decree of the Deputy Collector, and fixed the 22nd August 1872 for the re-hearing of the case in the presence of both parties.

The petitioner submits that the said order of the Subordinate Judge of Midnapore, dated the 3rd of August 1872, was passed without any jurisdiction, and ought to be set aside on the following grounds:—

1st.—That the Subordinate Judge had no power under section 119 of Act VIII. of 1859 to open an *ex-parte* decree passed by the Revenue Court under Act X. of 1859, particularly when the application to set aside the decree was not made within the time prescribed by law.

2nd.—That the Subordinate Judge was not justified in setting aside the said *ex-parte* decree, when there was no legal evidence before him as to the non-service of the summons on the defendants; on which ground alone the said decree could be re-opened.

The prayer is that this Court, under the general powers of superintendence vested in its will set aside the order of the Subordinate Judge, dated the 3rd of August 1872, as passed without jurisdiction.

The first question we have to consider is whether the case is governed by the procedure of Act VIII. of 1859, or of Act X. of 1859. In the former case, the period would be one not exceeding thirty days after any process for enforcing the judgment had been executed; in the latter, fifteen days after any such process. It is admitted that if section 54 of Act X. of 1859 applies, the application of the opposite party, the defendants in the rent-suit, was beyond time.

By section 108 of Act VIII. of 1869 (B. C.), it is enacted that whenever any suit or other proceeding under the provisions of the Acts mentioned in Schedule D, and amongst such Acts is Act X. of 1859, "shall at the "time when Act VIII. of 1869 comes into "operation, have been instituted before a "Collector or other officer having jurisdic-"tion in such suit or proceeding, such suit "or proceeding and all appeals therein shall "be heard and determined, and execution of "any decree or order therein shall be had, "and the practice and *procedure* therein shall "be such and the same as if this Act," *i. e.*, Act VIII. of 1869, "had not been passed."

Act III. of 1870 was passed for the purpose of transferring certain suits and proceedings to the Civil Courts which at that time, *i. e.*, at the passing of the Act, were pending in the Revenue Courts. Section 3 of the said Act will not apply to the case before us, for, at the time of the commencement of the Act, attachment had been issued. Therefore, even if the *forum* was altered, and the Civil Court was substituted for the Revenue Court, the procedure would still have to be regulated by the provisions of the Rent Law. In this view of the case, the application made by the opposite party, not having been made within fifteen days after process for enforcing the judgment had been executed, was beyond time, and the Subordinate Judge had no jurisdiction to entertain such application.

The order of the Subordinate Judge, dated the 3rd of August 1872, is quashed, and the rule made absolute with costs payable by the opposite party.

The 6th February 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Review—New Evidence.

Case No. 11 of 1872.

*Application for review of judgment passed by the Hon'ble Justices F. B. Kemp and F. A. Glover, on the 5th of August 1872, in Regular Appeal No. 14 of 1872.**

Brojendro Coomar Roy Chowdhry and others, Plaintiffs (Appellants), *Petitioners,*

versus

Mr. J. P. Wise, Defendant (Respondent), *Opposite Party.*

Mr. J. T. Woodroffe and *Baboos Sreenath Doss* and *Mohinee Mohun Roy* for Petitioners.

Mr. C. Gregory and *Baboos Kalee Mohun Doss* and *Ram Churn Mitter* for Opposite Party.

On an application for review, the Court refused to receive as new evidence documents which had been available to the applicant, and which he might, with anything like diligence, have obtained and filed in the Court below.

Kemp, J.—THIS is an application to the Court to review its judgment, dated the 5th of August 1872,* on the following grounds:—

1st.—That the Court was in error in holding that the decree obtained by Mr. J. P. Wise against Radha Madhub on the 14th November 1860, after the said Radha Madhub had executed the mortgage-bond in favor of the petitioner for review, can be used as evidence against him in the present suit.

2nd.—That the said decree, even if allowed to be used as evidence, cannot establish conclusively that the property in dispute was hypothecated to the defendant under the bond and the ijara lease dated the 16th Srabon 1260.

3rd.—That authenticated copies of the said bond and lease have been obtained by the petitioner, and are filed herewith, which clearly show that the disputed properties were never hypothecated to the defendant.

The pleader for the opposite party objected to the reception of the new evidence alluded to in the third paragraph of the grounds of review, and, after hearing him and Mr. Woodroffe for the applicant, we are of opinion that the documents cannot be received. It is clear that they were available to the applicant, and with anything like diligence, he might have obtained these copies, and filed them in the Court below, for in the written statement

* 18 W. R. 329.

he defendant, Mr. Wise, the applicant for review, who was the plaintiff in the Court below, was distinctly informed of the suit No. 10 of 1860, in which the original documents were filed. It was also intimated to him that the decree in that suit declared that the disputed properties were hypothecated for the debt due by Radha Madhub to Mr. Wise. Moreover, the decree of 1860 was put in by Mr. Wise.

With reference to the decree obtained by Mr. Wise against Radha Madhub in 1860, we did not in our judgment treat it as evidence by which the applicant for review was bound: we held, and still hold, that the decree of 1860 declared that Mr. Wise had a lien over the disputed properties. Such lien, we may observe, was of a date prior to the mut-kobala of the applicant for review, and was declared to subsist by the decree of 1860.

There is also evidence that the lease which Radha Madhub granted to Mr. Wise was a "daisoodee" lease.

The application is rejected with costs.

The 7th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Act VI. of 1871, s. 22—Act XXIII. of 1861, s. 11—Appeal—Jurisdiction.

Case No. 211 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Shahabad, dated the 23rd April 1872.

Mussamut Ruttunjote Kooer (Judgment-debtor), *Appellant,*

versus

Ram Doss (Decree-holder), *Respondent.*

Baboos Romesh Chunder Mitter and *Rughoobuns Sahoy* for Appellant.

Baboos Annoda Pershad Banerjee and *Aubinash Chunder Banerjee* for Respondent.

When the decree or order which is the subject of appeal is made in a suit, whether during the execution-proceedings or previously, the subject-matter in dispute within the meaning of Act VI. of 1871, s. 22, is the subject-matter in dispute in that suit, and not the mere amount of money which the order itself may directly affect.

Accordingly, where a question, such as is contemplated in Act XXIII. of 1861, s. 11, was determined by the order of a Subordinate Judge engaged in executing a decree, the appeal from such order was held to lie to the District Judge, and not to the High Court, although the original subject-matter in dispute which had been less than Rs. 5,000 had grown, by the addition of interest, to a sum exceeding Rs. 5,000.

Phear, J.—We think that the preliminary objection is a good objection, and must prevail.

It is admitted by both parties that the subject in dispute in the suit wherein the decree was made was in amount or value less than Rs. 5,000. A decree for the amount claimed with interest was, we understand, given on the 22nd September 1862; and the application for execution which is now brought before us was made some time in April 1872; but by that time the amount decreed had grown by the addition of interest to a sum exceeding Rs. 5,000. Upon the hearing of that application for execution, objections were raised by the judgment-debtor who seems to have been present. The Subordinate Judge overruled those objections, and directed the execution to issue.

It is this order of the Subordinate Judge against which the present appeal is preferred.

Now by section 11, Act XXIII. of 1861: "All questions regarding the amount of any "mesne-profits which by the terms of the "decree may have been reserved for adjust-"ment in the execution of the decree, &c., "* * * and any other questions "arising between the parties to the suit "in which the decree was passed, and relating "to the execution of the decree, shall be "determined by order of the Court executing "the decree, and not by *separate* suit."

Evidently it is just such a question as this in the section mentioned which was determined by the order of the Subordinate Judge engaged in executing the decree, namely, by the order appealed against.

The section goes on to say: "And the "order passed by the Court shall be open to "appeal."

This then is an order made, as it seems to us clearly, in the suit in which the decree was made, and *not in a separate* suit, and is an order, which, by the terms of this section, is open to appeal.

Section 22, Act VI. of 1871, is the enactment which now provides for the course of appeal. It says: "Appeals from the decrees "and orders of Subordinate Judges and "Moonsiffs shall, when such appeals are al-"lowed by law" (the present appeal is one of them), "lie to the District Judge, except

"where the amount or value of the subject-"matter in dispute exceeds Rs. 5,000, in "which case the appeal shall lie to the High "Court."

Now, the present appeal is an appeal from the Subordinate Judge, and it will, therefore, lie to the District Judge, unless, within the meaning of this section, the subject-matter in dispute exceeds Rs. 5,000.

Baboo Romesh Chunder Mi.ter has urged upon us with much force that the subject-matter in dispute between the parties to this appeal is the amount which is at this time due under the decree, and which will be levied against one of them if the order of the Subordinate Judge now appealed against is allowed to have force. It appears to us, however, that when the decree or order which is the subject of appeal is a decree or order made in a suit, whether during the execution-proceedings or previously thereto, the subject-matter in dispute within the meaning of this section is the subject-matter in dispute in that suit, and not the mere amount of money which the order itself may directly affect. This view has already been taken by Judges of this Court, for it has been lately determined by a decision,* which is reported in 9 Bengal Law Reports, page 195, that the subject-matter in dispute in a suit is the subject-matter for which the plaint is brought, and is not limited in the case of an appeal to the amount which the decree may have awarded as between the parties to the appeal.

It appears to us that, if we put any other construction than that which we have mentioned upon the words, we should make the section have an operation which could not have been contemplated by the Legislature, for it would cause the appeal to shift from one Court to the other, merely by such lapse of time as would suffice to make an amount which, when decreed, fell below Rs. 5,000, grow by the increment of the interest to a sum above Rs. 5,000.

It appears to us very clear that the order which is now appealed against is an order made in the course of a suit, the original subject-matter of dispute in which was, by the admission of the parties, an amount less than Rs. 5,000 and we think for that reason, under section 22, Act VI. of 1871, the appeal lies to the District Court, and not to this Court.

We think the application must be rejected with costs.

* 18 W. R. 261.

The 7th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Dispute as to Judgment-debtor's Property—Attachment—Sale.

Case No. 293 of 1872.

Miscellaneous Appeal from an order pass by the Judge of Gya, dated the 29 June 1872.

Ram Chunder (Decree-holder), *Appellant*

versus

Nund Lall Bose and another (Judgment-debtors), *Respondents.*

Mr. R. T. Allan and *Baboo Motee Lall Mookerjee* for Appellant.

Baboos Obhoy Churn Bose and *Nil Madh Bose* for Respondents.

The fact of a judgment-debtor's property being subject of an existing suit is no hindrance to its be attached in execution; but it is in the discretion of Court to order its sale at the fittest and most proper ti

Phear, J.—It appears to us that the Jud has refused execution in this case under t influence of some misapprehension. Sectio 212 to 215 of Act VIII. of 1859 prescri the mode in which application for executi and attachment of property should be mad And section 215 enacts that, if the applic tion is regular in all respects according the provisions of the preceding sections, t Court shall order execution of the dec according to the nature of the applicatio that is, according as the particular form attachment which is asked for.

In this case we understand that the pr perty which the judgment-creditor sou to have attached was duly specified, a there was no practical difficulty in the w of attaching it. The Judge refused to atta solely on the ground that this property w the subject of an existing suit between t present judgment-debtor and some ot party. For this reason the Judge thou that the property only amounted to a c tingent right and interest, and could not declared to be the subject of attachment a sale. It might, no doubt, be unadvisable in t interest of all parties concerned, that the s of a property so situated should be order But it appears to us that there is nothing this state of things to prevent the prope

d

rom being attached. It either is the property of the judgment-debtor, or it is not so at the present time; if it is the property of the judgment-debtor, the judgment-creditor has a right to have it attached as he asks to have it, and the judgment-debtor has no right to make any opposition to this. On the other hand, if it is not the property of the judgment-debtor, he has no concern whatever in the matter. The parties to whom the property which is so sought to be attached really does belong, if it does not belong to the judgment-debtor, may themselves come in under the course of procedure prescribed by Act VIII., and upon making their rights clear have the attachment removed. It seems to us that neither in the one alternative, nor in the other, has the judgment-debtor a right to be heard on this question; while, on the contrary, it seems to us that the Judge ought to have ordered execution by way of the attachment which was sought. It will, of course, remain in his discretion, having regard to all the circumstances of the case and the relations between the parties, to order the sale of the property, when attached, at the fittest and the most proper time.

The appellant must have his costs.

The 15th Janauary 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo Law—Deeds of Gift and Adoption—Special Appeal—Issues—Contracts—Damages—Specific Performance—Declaratory Decree.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Noggendro Chundro Mittro

versus

Sreemutty Kishen Soondory Dassee.

Plaintiff sued defendant for himself and as guardian of his minor son (N) to set aside two deeds relating to the adoption of the said minor, and alleged to be, the one, an agreement to give, and the other, an agreement to take, the child into adoption:

HELD that the deeds in form were not mere agreements to *give and take*, but deeds of gift and adoption, and that interchange was not necessary or important:

HELD that, if the defendant gave, or was willing to give, the child, the plaintiff had no right to sue for a declaratory decree on the ground that the deeds were null and void, because of the non-performance of certain religious ceremonies:

HELD that the most important issue in the cause was whether there was an actual delivery of the child; but that, as the Lower Appellate Court did not try that issue, the High Court was in error in deciding the case in special appeal upon that issue:

HELD that the deeds were not actually necessary to render the adoption valid; and if they were set aside, it might be proved *aliunde*.

The breach of an agreement by one of the parties is a ground for an action for damages, or for specific performance, but not a ground for setting aside the contract or declaring it null and void.

A declaratory decree is not a matter of absolute right, but may be granted or not at the discretion of the Court.

THE appellant was the defendant, and the respondent the plaintiff, in the suit below. The suit was brought against the defendant for himself, and as guardian of his minor son, called in the plaint Noggendro Chundro Mittro, to set aside two deeds dated 30th Joistee 1271, relating to the adoption of the minor abovementioned.

The plaintiff was the widow of Dwarkanath Ghose, deceased, who died childless. There was no dispute as to the fact of her having received permission from her deceased husband to adopt a son. The plaintiff, in her plaint, described the deeds: the one, as a deed by which the defendant *agreed to give* the said Noggendro Chundro Mittro, his minor son, to her for adoption in the dattaka form; and the other, as a deed by which she *agreed to take* the said child into adoption. The case of the plaintiff was that, notwithstanding the deeds, the defendant refused to give the child, and that, therefore, the form of adoption had not been complied with. The case of the defendant (see his written statement) was that the deeds were not mere agreements, but that the deed executed by the plaintiff was a deed of adoption, and the deed executed by the defendant a deed by which he actually gave his son in adoption, and that the plaintiff actually took the child, after the completion of the necessary rites and ceremonies. He stated that the plaintiff could not recede from the deed of adoption, and that he, the defendant, could not act contrary thereto. He proceeded: "Now, when the said son, by virtue of his having been adopted, has obtained for himself and his heirs the legal proprietorship of the immoveable and moveable property, and has become the undisputed malik of the estate (referring to the estate of the plaintiff's deceased husband) for ever, according to the precepts of the Shastras, in that case the plaintiff has no power to ignore the adopted son's rights; for the giving and taking when

* From the judgment of Norman and E. Jackson, JJ., Special Appeal No. 2153 of 1868, decided 5th March 1869—11 W. R., *Civil*, 196.

completed cannot be revoked, and the plaintiff has no right to undo that which she has done in obedience to the command of her husband, and the Court cannot interfere in that which the plaintiff has already done." Further, he contended that, from the terms of the deed executed by the plaintiff, it was clear that the child had been adopted, and that the necessary rites enjoined by the Shastras had been performed; that the child had ceased to belong to his (the defendant's) gotra or family, and had been enrolled in the gotra of the plaintiff, and that the name and family-name of the child had been changed from Mittro to Ghose after the family-name of his adoptive father.

The deeds in form are certainly not mere agreements to give and take in adoption.

The deed of gift addressed to the plaintiff commences: "This is a deed whereby the child is given in adoption." Then, after reciting that the plaintiff's deceased husband, in consequence of his having no issue, had, during his life, given permission to the plaintiff to adopt a male child, and that the plaintiff had asked the defendant for a child to compensate for the said defect, and to perform the funeral rites of the plaintiff and her husband, &c., proceeded in the operative part of the deed as follows:—

"I have willingly given in adoption my second son, Noggendro Chundro Mittro, by my third wife, Sreemutty Monmohinee, under the altered name of Soshee Nauth Ghose. The said male child with whom henceforth I have no right at all according to Shastras, and who has thus become divested of gotra appertaining to my family, and being equal to the son of your body, has thus become vested with family-rights and gotra (lineage) appertaining to your husband's family, under the name of Soshee Nauth Ghose, will discharge or perform all the secular, as well as all the religious, duties of your husband's family, and will be the owner himself and his heirs for ever of all your husband's property, namely, his zemindary, and all immoveable as well as moveable property, and lands paying rent or rent-free, which stand in his own name or in benamee, and which exist at present, or may hereafter be acquired. For this effect, I have executed the deed whereby the child is given in adoption with the following respectable witnesses, that it will prove efficacious in future."

The deed executed by the plaintiff addressed to the defendant, commences:—

"This is a deed of adoption. My husband, the late Dwarkanath Ghose, died without issue, leaving me his heiress, on the 30th June 1863 (corresponding to the 17th Assar of the year 1270). My husband, in consideration of his having no issue in his lifetime, gave me permission to adopt a son for the due performance of the funeral rites of himself and of his ancestors, paternal and maternal, and of myself, and for the due observance and continuation of the religious ceremonies and other ancestral duties, and the other rites and ceremonies peculiar to his family, and fitted to his social position, and for the care of his property, &c., and for the preservation of his name and honor, had expressed his desire that the son so adopted might be the exclusive proprietor of all his property and zemindary, and that none else might have any right or title to his property. At present, in obedience to the aforesaid injunctions, and with the unanimous consideration and opinion of myself and my near relations and members of the family, knowing you to be my sincere and faithful friend, and believing that, by means of your respectable family, the object aimed at by myself and my husband will be realized, *I do, with the prescribed rites and ceremonies, adopt as my son Noggendro Chundro Mittro*, your second son by your third wife, Sreemutty Monmohinee. The said Noggendro Chundro Mittro has thus become divested of all the rights and gotra (lineage) appertaining to your family, and has become vested for ever with the rights and gotra of my husband's family under the name of Soshee Nauth Ghose. By virtue of which he having become equal to the son of my body, is become the owner himself and his heirs of all my husband's ancestral and self-acquired property which stands in his own name or benamee, namely, zemindary and lands, rent-paying as well as rent-free, and gardens, &c., and all the moveable and immoveable property, &c. He will henceforth perform, in the manner described above, the funeral rites, &c., of myself and my husband and of his (my husband's) paternal and maternal ancestors, and shall perform the religious and family-rites and other duties for ever. During his minority, I, his mother, shall take care of all his property."

The deeds, having been executed and attested, were both registered, and made over to the plaintiff's mookhtear.

The case was tried before the Principal Sudder Ameen, and amongst others the following issues were laid down: Whether the adoption of the child was complete or not, that is, whether the requirements of the Hindoo law were carried out, or the gift was

not complete and the child not made over. Whether the defendant refused to make over the child to the plaintiff or not. Witnesses were examined on both sides, and several letters which passed between the defendant and Soorjonarayan Singh, the brother of the plaintiff, were put in evidence. The Principal Sudder Ameen found that no religious ceremonies were performed; he also tried as a distinct issue whether there was a formal delivery and acceptance of the child, and found that issue in the negative in favor of the plaintiff. He said:—

"It is true that the language of the instruments convey the idea that there was gift and acceptance, as well as completion of ceremonies; but as the plaintiff denies them *in toto*, a judicial determination on these points becomes necessary. It has been already established that the ceremonies were not performed; therefore it remains to be seen whether there was formal gift and acceptance of the boy, as well as due delivery of deeds. If the witnesses of the plaintiff are to be believed, and I see no reason to doubt their veracity from their respectable position, neither was there gift or acceptance of the boy, nor due delivery of the deeds."

It is not very clear what the Principal Sudder Ameen meant by the latter words, "nor due delivery of the deeds," or by the words used in another part of his judgment in which he says: "It has been established that the deeds are void for want of delivery." It is clear that he did not use the word "delivery" in the technical sense in which that word is used in England when applied to the execution of a deed. He probably meant that the deeds were not interchanged; but that was not necessary or important, if the deeds were deeds of gift and adoption, and not mere agreements to give and adopt. The deed executed by the defendant was delivered to the plaintiff. The fact that the deed executed by the plaintiff was retained by her, and not handed over to the defendant would rather tend to show that at that time it was considered that the child had been adopted. For if the child was adopted, the plaintiff became his mother and guardian, and would naturally keep the deeds of gift and adoption on behalf of the child as evidence of the adoption, and as part of the muniments of her child's title to his adoptive father's estates. [Be this as it may, however, it is clear that the deeds were executed. They are admitted by the plaintiff in the plaint and by the defendant in his written statement. Indeed, if they were not executed, the suit was useless, and must fail.]

In concluding his judgment the Principal Sudder Ameen said:—

"Summing up, therefore, what has been stated above, it is clear that there has not been a due performance of the ceremonies, and the effect of the deeds was that it was agreed that the child should be made over for adoption; but the defendant has not done what he was required to do, namely, to hand over the child to the plaintiff; it is, therefore, ordered that the suit of the plaintiff be decreed, and she be declared to be not bound by the deeds dated the 30th Joistee 1271, which are also declared cancelled and inoperative. The costs of the plaintiff to be paid by the defendant."

Upon that judgment the following decree was drawn up:—

"It is ordered that this case be decreed; that the female plaintiff may not be required to observe the document dated the 30th Jeyt 1271, which has been declared null and void; and that the costs of the female plaintiff be paid by the defendant."

The defendant appealed to the Judge upon the following, amongst other, grounds:—

"6. That, according to Hindoo law, the Court below was wrong in supposing that more ceremonies than the actual giving and receiving of the child are necessary and essential for the completion of a *Sudra* adoption. The non-observance of any other ceremony does not invalidate a *Sudra* adoption, as will be borne out by Hindoo law and decisions.

"7. That, from the judgment of the Court below, it is clear that it has considered adoption in general, and not as a *Sudra* adoption only, which was the sole point for contention in this suit."

The 14th ground of appeal was:—

"That the Court below was wrong in deciding that the delivery of the child and of the two primary documents were not proved, inasmuch as there was sufficient satisfactory evidence in the case to establish the same."

The appeal was transferred by the Judge to the Additional Judge. The latter did not try the issue whether there was an actual or formal delivery of the child or not. He said:—

"We now come to the merits of the case. The *first* point to be noted is that the issue in this case has been unnecessarily widened. Appellant contended that ceremonies had been performed, and brought forward witnesses *who distinctly swore that not only the giving and taking, but a number of other reli-*

gious rites were performed. It was, therefore, quite unnecessary on the part of the lower Court to enter into the question of what rites are or are not essential to a Hindoo adoption. If the defendant's (appellant's) witnesses are to be believed, not *only essential* but admittedly non-essential rites were performed. *Defendant (appellant) must abide by the evidence which he adduces, and stand or fall with it. His virtual plea is that all or many of the ceremonies were performed. He cannot, in the same breath, urge that one only (that of giving and taking) was performed, and that one only is necessary to the validity of a Sudra adoption.*

"*If the above view is correct, the simple issue* in this case is whether the ceremonies of adoption have been performed (as alleged by appellants) or have not been performed.

"The lower Court has found, after a careful inquiry and weighing of evidence, documentary and verbal, on either side, that *no religious ceremonies of any sort* were performed, and, on the numerous grounds recorded in its judgment, has expressed an opinion that defendant's witnesses are not to be believed, whilst plaintiff's (respondent's) witnesses are stating the truth when they say that no ceremonies have ever been performed. The lower Court also lays great weight on certain expressions used in a letter from appellant, dated 13th Cheyt 1271, which contains, in the lower Court's opinion, expressions justifying the inference that, by defendant's own admission, *no religious* ceremonies had been performed, and, consequently, no valid adoption had taken place. The question before the Court is whether the finding of the lower Court *on the above question of fact* is correct or not. If it is, plaintiff's (respondent's) claim for cancelment of documents must be decreed, for it is admitted on all hands that an adoption-deed is void in the absence *of a religious ceremony or ceremonies.*

"After a careful consideration of the evidence, both verbal and documentary, adduced on either side, the conduct of the parties, and the various probabilities and improbabilities which have been brought to the notice of the Court by the Counsel on either side, this Court has come to the conclusion that there is no valid reason for disturbing the finding of the lower Court to the effect that no ceremonies were performed, and that, consequently, the deeds of adoption filed in the case are null and void.

"The appeal is, therefore, dismissed with costs."

The defendant appealed specially to the High Court.

The fourth ground of appeal was:—

"4. If any ceremonies were essential, the legal effect and weight of the evidence show that such had been performed, and such evidence could not be affected by the failure of defendant's witnesses to prove the performance of other non-essential ceremonies."

That ground of appeal was clearly directed to that part of the judgment of the Additional Judge in which, after saying that if the defendant's witnesses were to be believed, not only essential, but non-essential rites were performed, "he could not in the same breath say that one only—that of giving and taking—was performed."

It appears to their Lordships that the view taken by the Additional Judge was not correct. The question to be determined was not whether the child was legally adopted or not, but whether there was sufficient ground for setting aside the deeds, or declaring them to be void. If the defendant gave the child, or was willing to give the child, the plaintiff had no right to sue him in order to have a declaratory decree that the deeds were null and void, because certain religious ceremonies necessary to constitute a valid adoption had not been performed.

If the defendant executed the deed of gift which was admitted, and formally delivered the boy, it was the plaintiff's own fault if she did not formally accept the child, and cause the religious ceremonies to be performed. If she chose to execute a deed, declaring that the child had been adopted by her with the prescribed rites and ceremonies, when in fact the child had not been even given, it was her own fault.

The most important issue in the case was whether there was a formal gift of the child, or, in other words, whether there was an actual delivery of the child in addition to the execution of the deeds. That issue was not tried by the Additional Judge.

The defendant appealed specially to the High Court, and that Court held that it was not necessary to determine whether or not a Sudra can be adopted without the performance of religious ceremonies, and dismissed the appeal upon the ground that there was no actual giving and receiving of the child. They said:—

"We see no necessity to go into the question whether or not a Sudra can be adopted without the performance of religious cerem

ies, namely, the offering of the burnt sacrifice, &c.

"The contention of the special appellant that by the execution of two deeds, the e purporting to be a gift, and the other acceptance of the child by the several ties respectively executing the deeds, re was a valid giving and receiving of child, so as to make him the adopted of the person who by these deeds pears to have accepted him as a son.

"We think there is no foundation for the ument of the special appellant. It appears us that the giving and receiving of a son order to constitute a valid adoption, st be an actual giving and actual receiving the child."

The High Court appears to their Lordships have been in error in considering merely ther there was any valid adoption or not, tead of considering whether, if there no adoption, it was owing to the fault the defendant, or to the fault of the intiff herself. They also appear to have n wrong in holding on special appeal t there had been no actual giving of the ld when the Additional Judge had not d that issue. They say:—

"By the grounds of special appeal filed, appellant does not suggest that there been any actual giving and taking of the ld, but only a constructive giving and ing by the execution of the deeds. We k that, assuming the facts relied upon regards such giving and receiving to be blished, it is not shown that there was this case any valid adoption. The change name, supposed to be evidenced by the ds, is not a sufficient overt act to show t the child was given and received."

With reference to that statement it appears their Lordships that the fourth ground of peal to the High Court referred to that t of the decision of the Additional Judge which he held that the defendant could t rely upon the giving and taking alone, d that the only issue was whether the igious ceremonies had been performed. e word "ceremonies" in the fourth ground appeal to the High Court was clearly ended to include the actual giving and taking, or delivery and acceptance of the child, the Judge treated this giving and taking a ceremony, but as one upon which alone defendant could not rely. The judgment of the Judge is far from clear, arising n the use of the words "ceremonies" and ligious ceremonies." He treats the giving taking as a ceremony, but whether as a religious ceremony is not clear. He finds that the decision of the Principal Sudder Ameen that no religious ceremonies were performed was correct, and afterwards speaks of the same finding as one to the effect that no ceremonies were performed. Looking to the fact that the finding of the Principal Sudder Ameen that there was no formal giving and taking was distinct, and in addition to his finding that no religious ceremonies were performed, their Lordships think that the Additional Judge did not try or determine the issue whether there was a formal giving and taking notwithstanding the fourteenth ground of appeal to the Judge. This being so, it appears to their Lordships that the High Court were in error in deciding the case upon the ground that there was no actual giving and actual receiving of the child.

In the case of Sreemutty Joymoney Dossee *vs.* Sreemutty Sobosoonderee Dossee (Fulton's Reports 75), it was held by the Supreme Court in Calcutta, that amongst Sudras no religious ceremony, except in the case of marriage, is necessary.

If the Judges of the High Court considered that this suit was maintainable if there was no valid adoption, they ought to have determined whether, in the case of Sudras, any religious ceremonies were necessary to render an adoption valid; and if they considered that religious ceremonies were not necessary, they ought to have directed the Judge to try whether there was a formal delivery of the child, or whether the defendant refused to deliver him, an issue upon which the defendant had appealed to the Judge from the finding of the Principal Sudder Ameen. If their Lordships thought that this suit could be maintained, they would now do what they consider the High Court ought to have done, but their Lordships do not consider that this suit is under any circumstances maintainable.

The suit is not to set aside the adoption, or to declare that there was no valid adoption, and thus to remove a doubt as to the child's title to the estates. It is merely to set aside the deeds. They were not actually necessary to render the adoption valid, and if they be set aside, the defendant or the child may prove the adoption *aliunde*.

It was stated by the Principal Sudder Ameen that the estates of the plaintiff's deceased husband were of considerable value, paying a rental of Rs. 40,000 a year. The suit was valued at only Rs. 1,500. The appeal to Her Majesty in Council was allowed upon the ground that the suit indi-

rectly involved a claim to property of not less value than Rs. 10,000. The defendant pleaded that the suit was undervalued, but the Principal Sudder Ameen held that, as the pleader of the defendant had not argued the point, it might be presumed to have been given up. It would have been difficult for the defendant to contend that the suit, to have the deeds declared void or set aside, was of greater value than Rs. 1,500. The case was accordingly tried as a suit of that value. The consequence was that the regular appeal went to the Judge, and only a special appeal to the High Court. If the suit had been valued at Rs. 5,000, the appeal to the High Court would have been a regular appeal, in which they and, upon appeal from them, this tribunal could have examined the evidence, and determined the issues in fact.

If a decree be made declaring that the deeds are invalid, a suit may still be brought by the infant to try his title to the estates; and in that suit the evidence may have to be weighed by the High Court, and afterwards by the Judicial Committee of the Privy Council. It would be very unsatisfactory if the deeds should be declared void in the present suit, and the adoption should afterwards be upheld in a suit by the infant against the widow, or any other child who, upon the faith of a declaratory decree in this suit, may be given to the plaintiff in adoption, and be adopted by her.

No fraud on the part of the defendant has been alleged or proved; all that has been charged against him is that he refused to give the child, or to execute a deed in cancellation of the former deeds.

If the instruments operated merely as agreements to give and accept the child in adoption, as contended by the plaintiff, the breach by the defendant of his agreement to give would not render the deeds null and void. The breach of an agreement by one of the parties thereto is a good ground for an action for damages or for a specific performance, but it does not render the contract void, or constitute any ground for setting it aside, or for declaring it to be null and void.

The cause of suit is stated in the plaint to have arisen on the 10th Choitro 1272, when the defendant "denied executing," meaning "refused to execute," an ikrarnama in cancellation of the ikrarnamas aforesaid. One of the plaintiff's objects, as stated in her plaint, in having the documents set aside, was to throw off the burthen which was on her in consequence of the deeds. The High Court says:—

"There was no adoption. The natural father of the child now refuses to carry out his intention to give his child for the purpose of adoption. But the deeds are capable of being at any time used by him or his son to prove that there was an adoption. Under such circumstances, it is clear that the plaintiff has a right to come to the Court to ask relief, and pray to have the deeds declared void. We interfere for the protection of her right to her husband's property over which those deeds would cast a cloud, which it is necessary for the plaintiff's security to remove."

Their Lordships have already alluded to the absence of any allegation or proof of fraud on the part of the defendant, and also to the absence of any finding by the Judge upon the issue whether the defendant formally gave the child, or refused to deliver him. If the child was lawfully adopted, the estates of the plaintiff's deceased husband vested in him as son and heir, and the plaintiff ceased to have the estate of a Hindu widow therein; she also ceased to have a power to adopt another son during the life of the child.

It has been held that under the 15 and 16 Vic., c. 85, s. 50, a declaratory decree could not be made unless plaintiff would be entitled to consequential relief if he asked for it (Hooke *vs.* Lord Kensington, 2 K. and J. 756). The 15th section of Act VIII. of 18[illegible] is in similar terms. The plaintiff, upon the facts found, is not entitled to any relief against the defendant. It has been shown that, treating the documents as mere agreements between the plaintiff and the father of the child, the plaintiff could have no right to maintain the present suit. Treating the instruments as deeds of gift and adoption, which their Lordships consider them to be, there is no consequential relief to which the plaintiff would be entitled against the defendant if the deeds be declared void. Though deeds of gift and acceptance are not actually necessary for the validity of an adoption, they are still evidence in support of the child's title as an adopted son, and of his rights consequent upon the adoption. In a case of conflicting evidence in a suit brought on behalf of the child against an adoptive mother in respect of her deceased husband's estate, a declaration by her, whether by deed or word of mouth, that she had adopted the child with all necessary ceremonies, would be strong corroborative evidence in the child's

vor. In the present case there was conicting evidence as to the fact of a formal iving and taking, as well as to the fact of e performance of the necessary religious remonies; and even upon the evidence of e plaintiff's own witnesses, notwithstandg the allegation in the plaint that the child s remained in the house of his natural ther, it appears that the child, whether dopted or not, did reside for some time in e house of the plaintiff. There are also pressions in the letters from the plaintiff's other, from which it might be inferred that e child had been adopted, and that the aintiff was desirous to have the adoption ancelled. Their Lordships express no opion upon the evidence with reference to the ct of adoption, as the case is now before em merely upon appeal from a decision of e High Court upon special appeal.

It is not a matter of absolute right to tain a declaratory decree; it is discretionary th the Court to grant it or not, and in ery case the Court must exercise a sound dgment as to whether it is reasonable or t, under all the circumstances of the case, grant the relief prayed for. There is so uch more danger in India than here of rassing and vexatious litigation, that the ourts in India ought to be most careful that ere declaratory suits be not converted into a w and mischievous source of litigation.

The child is no party to the present suit; d any declaration made in it with regard the validity or invalidity of the deeds will t be binding upon him if a suit be hereafter ought on his behalf against the present aintiff respecting the estate of her deceased sband; nor would it be binding in any it between the child and the reversionary irs of the deceased husband after the death the plaintiff, or between the child and y other child who, upon the faith of a clarator decree in this suit, may hereafter given in adoption or adopted by the widow, between the child and his natural brothers, any other person who may hereafter aim to exclude him from the heritage his natural father's property upon e ground that he has been adopted into nother family. It appears to their Lordships at, under these circumstances, it would t be exercising a sound discretion, even if could be done, to order the deeds to be ncelled, or to set them aside or to declare em void. The defendant takes no interest der the deed of adoption. A declaration nding upon him only and not upon the ild would be worse than useless, for it would not protect the plaintiff, or any child whom she may adopt, from any claims on behalf of the defendant's son to the estates; and it might induce some other person to give his son to the plaintiff in adoption, and also induce the plaintiff to adopt another child when the declaration in the decree could not be of any possible use to them.

If the defendant's son was adopted, the defendant had no power to cancel the deed of adoption, or to give the plaintiff permission to adopt another son. Nor would his refusal to send back to the plaintiff her adopted son, or the fact of his harbouring him in his original home invalidate the adoption. Whether the child was adopted or not, the defendant was not bound to execute a deed in cancellation of the former documents, and his refusal to execute such a deed could not give the plaintiff a cause of action as alleged in her plaint, or rightly subject the defendant to the costs of the suit which have been awarded against him.

It was suggested that a suit against the father, in his own right and as guardian of his minor son, was tantamount to a suit against the father and the son. But that is not correct. If the son had been made a co-defendant, it would have been necessary to have a guardian appointed for him. If the child was adopted, his natural father was not his guardian. In a suit by the plaintiff to set aside the deeds upon the ground that there had been no adoption, the plaintiff had no more authority to constitute the father the guardian of his son, by suing him as guardian, than the father would have had to constitute the plaintiff the guardian of the child, if he had sued her for a declaration that the child had been validly adopted.

This is not a mere technical objection. If the father really refused to give the child in adoption, because he did not desire to have him adopted, he was not a proper person to protect the child's interest, or likely to make the best case on his behalf in a suit to declare the adoption invalid. In making these remarks their Lordships do not desire to impute to the father, in the present case, any neglect of his son's interests, for he appears to have desired to establish the adoption, and to have acted properly in refusing to execute a deed of cancellation when under the belief, whether right or wrong, that the adoption was complete.

The law is clear upon the subject of guardianship of male minors.

By Act No. 40 of 1858, passed before this suit was instituted, it was enacted that the

care of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court; and by section 3 it is enacted that, where the property is of small value, the Court having jurisdiction may allow any relative of a minor to institute or defend a suit in his behalf. In other cases a certificate of administration is necessary.

The suit must be treated as one against the defendant, the father, alone; and for the reasons above given their Lordships will humbly advise Her Majesty that the decree of the High Court, and the decrees of both the lower Courts, be reversed, and that the suit be dismissed, and that the plaintiff (the respondent) do pay to the defendant (the appellant) the costs of this appeal and the costs in all the lower Courts.

It is hardly necessary to add that this decision will be no bar to the trial of the question whether the child was or was not duly adopted in any suit properly framed for that purpose.

The 21st January 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Jageer Tenure—Possessory Action—Onus Probandi.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Maharajah Juggernath Sahee and another

versus

Mussumut Ahlad Kowur and others.

In a suit to recover possession of certain lands upon the ground that they were granted as a jageer tenure by plaintiff's ancestor to one P and his lineal descendants, and that such descendant had failed:

HELD that it was necessary for plaintiff to prove the grant alleged in his plaint, without which no cause of action would have been shown; and as the tenure was created in the proper and usual manner, *i.e.*, by pottah and kubooleut, the latter would be in the possession of plaintiff's ancestors. As this was not produced, no secondary evidence given of it, and no foundation laid for giving such evidence, it was unnecessary to go further into plaintiff's case.

THIS was a suit brought by the plaintiff to recover possession of certain lands upon the ground that those lands were granted by an ancestor of his to one Pryag Roy to be held in jageer tenure, that is, to Pryag Roy and his lineal descendants, that Pryag Roy's lineal descendant had failed, and therefore the plaintiff was entitled to resume possession.

A good deal has been said on the subject of the burden of proof in this case. It is manifest that the plaintiff could not, by merely alleging that a grant had been made, and that grant had failed, entitle himself to a decree; some burden of proof must rest upon him; and the only real question is, what amount of proof could be reasonably expected from him, so as to shift the burden of proof upon the defendants. Their Lordships are clearly of opinion that it was necessary for him to prove the grant which he alleged in his plaint, without which the plaint would have shown no cause of action, namely, a grant to Pryag Roy; for on whomsoever the burden of proof may lie with respect to the subsequent part of the case, whether it lies on the plaintiff to prove that the descendants of Pryag Roy had failed, or upon the defendant to prove that they still lived, it is necessary to ascertain to whom the grant was made in order to determine the subsequent question to be tried, namely, whose descendants have or have not failed.

It appears by the plaintiff's own showing that this tenure was created in the proper and usual manner, namely, by a pottah and kubooleut, the pottah being the grant itself, which would be presumed to be in the possession of the defendants—the kubooleut being also an original document, whereby the grantee acknowledges the grant, and that he holds upon the terms of the grant; this would be in the possession of the ancestors of the plaintiff, and would be expected to be found among his muniments of title. The plaintiff alleges that such a kubooleut did exist, but he has failed to give any proof of it whatever. He has not produced the kubooleut; he has not given secondary evidence of it; he has not even laid the foundation for giving secondary evidence, if he had secondary evidence of it in his possession. He does not call any body who has the custody of his muniments of title, or who is acquainted with them or with their place of custody, for the purpose of showing that search has been made, and that no such kubooleut has been found. Indeed, it is not inconsistent with the plaintiff's case that such a kubooleut or some kubooleut under which this property was granted may at this moment be in his possession. He has contented himself with putting in certain

* From the judgment of Loch and Glover, JJ., in Regular Appeal No. 279 of 1867, decided 19th May 1863.

inal proceedings instituted by him in against his then Canoongoe, wherein he plained that the Canoongoe had abstract- his records. It appears by those pro- ings that the Canoongoe was convicted sentenced to imprisonment until he ld deliver them up, but it is not shown that sentence was ever executed; or, if ted to any extent, whether it had or not the effect of inducing the Canoongoe ive up all or any of the records. But it ld appear from this proceeding, that, at ents, according to the plaintiff's showing, kubooleut was in existence at no very nt time, namely, in the year 1842; and ppears to their Lordships that there ld be, or ought to be, no very great diffi- y in proving that such a kubooleut did exist, and that it was one of the docu- ts which were abstracted by the Canoongoe deed, it were so abstracted); because ese criminal proceedings no less than witnesses were called, who gave a ral description of the documents said to be acted, though they do not, indeed, spe- this. None of these witnesses are now d, nor is any explanation given of their being called. It is not shown whether are dead or absent, or whether it is im- ible to call them; and the plaintiff him- who instituted these very proceedings, who may be supposed to be cognizant of cument of such importance, if it existed g his records, does not think fit himself ve evidence.

nder these circumstances there is an e failure of proof of the kubooleut. No ence, either primary or secondary, is of it, nor indeed, as before observed, even the foundation been laid for giving ndary evidence.

t it has been contended on the part of tiff that the absence of this proof may upplied by other evidence in the case. is said that the nature of the tenure is ed by the admissions of the defendants, so far their Lordships are disposed to e with the Counsel for the plaintiff. But it is further alleged that it has been n that Pryag Roy was the first person possession of this property under the t. And if it had appeared that Pryag was, in fact, the first jageerdar in possession his property, and that it had descended Pryag Roy through father and son to last owner, Deo Persaud, then it might been that some evidence was given of nature of the tenure and of the person hom it was granted, independently of the kubooleut, so as to shift the proof upon the defendants; but their Lordships are of opinion that it is not proved that Pryag Roy was the person originally in possession, and that, therefore, the absence of the kubooleut is not supplied by evidence of the description referred to.

That being so, in their Lordships' opinion, the plaintiff has altogether failed to prove the very foundation of his case, namely, the grant to Pryag Roy; and therefore it becomes unnecessary to consider the questions which would have arisen if he had given this proof. It becomes unnecessary to determine whether or not the descendants of Pryag Roy have failed, or on whom the burden of proof lies with respect to this issue. It is unnecessary to determine whether or not the defendants have shown that the grant was, as they allege, made to Anund Roy, nor to determine the truth or falsehood of the charge of forgery which has been preferred against them. If, indeed, the plaintiff had given any evidence whatever whereby he brought himself into Court, then the conduct of the defendants might have been material, for, in such a case, proof of the fraud and forgery on their part might have assisted the plaintiff's proof; but, until the plaintiff has given evidence sufficient to bring himself into Court, all the subsequent questions become immaterial and unnecessary to be inquired into. This their Lordships understand to have been substantially the view of the High Court, who declined to go into these questions.

For these reasons their Lordships are of opinion that the plaintiff has failed to prove his case, and that the judgment of the High Court is right; and they will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

The 24th January 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, and Sir Lawrence Peel.

Enhancement—Notice—Middleman — Alluvion —Act X. of 1859, s. 17—Reg. XI. of 1825, s. 4, cl. 1.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

* From the judgment of Bayley and Phear, JJ., in Regular Appeal No. 213 of 1867, decided 3rd January 1868—9 W. R. 65.

Soorasoonderee Dabea and another, representatives of the late Gopal Lall Thakoor,

versus

Golam Ali.

In a suit for arrears of rent in pursuance of a notice of enhancement, where it was admitted that defendant was entitled to a perpetual right of occupancy so long as he paid the proper rent, and also that he was a middleman, and not a cultivator; and it appeared from the kubooleut that a howaldaree amulnama had been granted at defendant's request, without any rent for the first year, at varying rates less than Rs. 5 a kanee up to 1264, and at the fixed rate of Rs. 5 per kanee in and after that year:

HELD that it could not have been intended that Rs. 5 should be the rent for that year only, but that the more reasonable construction was that that was to be the rent per annum during the remainder of the holding, and that consequently the rent was not liable to enhancement beyond Rs. 5 a kanee.

HELD that defendant might be liable under Reg. XI. of 1825, s. 4, cl. 1, but not in this suit which was under Act X. of 1859, s. 17. If liable to enhancement at all, his rent could only be enhanced according to the pergunnah-rate payable by similar holders.

A suit to enhance being very different from a suit to recover arrears of rent at the rate originally fixed, HELD that plaintiff was not entitled to a decree in this suit for the rent of 1272 at the rate fixed in the kubooleut.

THE appellants are the executors and representatives of Gopal Lall Thakoor deceased, who was the plaintiff in the suit below.

The appeal is from a decision of a Division Bench of the High Court in Bengal, overruling a decision given in favor of the plaintiff by the Deputy Collector of Madareepore, Zillah Backergunge.

The suit was brought on the 12th July 1866, to recover the sum of Rs. 5,120 for arrears of rent for the year 1272, in pursuance of a notice of enhancement served under the provisions of section 13, Act X. of 1859, together with interest thereon, amounting altogether to the sum of Rs. 5,613-13-10, with costs and future interest.

The grounds of enhancement relied upon by the plaintiff were: 1st, that the value of the produce and the productive powers of the land had increased otherwise than by the agency or at the expense of the defendant; and, 2ndly, that the quantity of land held by the defendant was greater than the quantity for which rent had been previously paid by him.

The excess as regards the quantity of land held by the defendant, and in respect of which enhancement was claimed, consisted partly of lands within the boundaries described in the kubooleut under which the defendant held, partly of lands subsequently added thereto by alluvion.

It is necessary to consider, 1st, whether the defendant is liable to enhancement; 2ndly, if liable, whether he was liable to be enhanced as a middleman or as a ryot; and, 3rdly, if liable only as a middleman, whether he was liable to be enhanced in the manner and to the extent claimed by the notice.

The defendant produced a document purporting to be a pottah executed by the plaintiff. It was contended on the part of the plaintiff, and found by the Deputy Collector, that the document was a forgery. The Lordships are of opinion that the High Court was right in holding that it was not material to determine whether the alleged pottah was a forgery or not, for a kubooleut, dated the 4th Bhadro 1260, signed by the defendant, was produced on the part of the plaintiff and was admitted by the defendant to be a genuine document. That document shows the nature and terms of the defendant's holding; it is set out at page 94 of the record. By that instrument, after reciting that, within the chur formed on the site of the old diluviated lands of the villages of Panchcotee and Chur Panchcotee, &c., bounded as therein mentioned, there were about 8 drones 6 kanees and 8 gundas of jungle waste land fit for cultivation, for 8 annas whereof, *viz.*, drones 3 kanees and 16 cowries, the defendant had applied for a howaladaree amulnama, at a rate of rent of Rs. 5 per kanee, without any rent for the then present year 1260; at the rate of Re. 1 per kanee for the year 1261; at the rate of Rs. per kanee for the year 1262; at the rate of Rs. 3 per kanee for the year 1263; and at the full customary rate of Rs. 5 for the year 1264, it was declared by the defendant that for 4 drones 3 kanees and 4 gundas of land within the boundaries therein mentioned the said Gopal Lall Thakoor had granted a howaladaree amulnama according to the prayer contained in the said application, and the defendant then agreed as follows:—

"We shall till and cultivate the d. 4 k. g. 4 (four drones three kanees and sixteen cowries) of land situate within the boundaries aforesaid, less rukba, at the rate of g. 4 (sixteen cowries) per kanee, *viz.* k. 11 g. 4 (eleven kanees and sixteen cowries), that is, d. 3 k. 8 (three drones and eight kanees), and hold during the year 1260 without any rent, after which we shall continue to pay as rent according to the instalments mentioned below, year by year, and month by month—in the year 1261, Rs. 56 (fifty six), being at the rate of 1 rupee per kanee; in the year 1262, Rs. 112 (one hundred and twelve), being at the rate of Rs. 2 per kanee; in the year 1263, Rs. 168 (one hundred and

ty-eight), being at the rate of Rs. 3 per nee; and in the year 1264, Rs. 280 (two ndred and eighty), being at the full cus-nary rate of Rs. 5 per kanee. We will not ke any objections or excuses on the ground drought, inundation, death of tenants, conding of them, sandy land, fitness or itness for cultivation, cultivated or not tivated, and the like, and even, if we do, y shall not be admitted. In the event our making default in paying our rent ording to the instalments, we will pay the ar due with interest at the rate of 1 (one) ee per cent. per mensem on the lapsed talments. Should we neglect to do so, arrear will be realized with interest ording to the law for the time being in ce. After the month of Pous of the year 1 (twelve hundred and sixty-one) notice 15 days will be issued to us from your ce to file a kubooleut, specifying the quan-of land and amount of rent, according measurement as per boundaries. In the nt of our not attending before the Ameen may be deputed to make the measure-nt, and causing the measurement to be de and the rent to be fixed, the measure-nt will be made in our absence, and tever quantity of land may be found measurement to be cultivated or fit for tivation, we shall be taken to have cepted and engaged for, as part and parcel this howala; out of the same, the culti-ed land in excess of the quantity men-ned above, less rukba, shall be charged h rent, which being added to the rent fixed the rates mentioned above, we will pay m the year 1261. We will take a pottah ording to the practice of your zemin-y office after executing a kubooleut, spe-y the total quantity of land measured, h the rent thereof, at the rates mentioned ove and progressive rates, being exempt m the payment of rent for two years in re-ct of lands fit for cultivation, continue to pay it according to the instalments and condi-ns mentioned in the kubooleut. We shall t be able to make any excuse or objection reto, and even, if we do, they shall not admitted. To this effect we execute this booleut, having received the howaladaree mlnama. Dated the 4th Bhadro 1260."

It was admitted on the part of the appel-t that the defendant was entitled to a petual right of occupancy so long as paid the rent which the appellant had ight to demand; but it was contended his behalf that the rent was not fixed ond the year 1264, and was, therefore, subject to enhancement after that date. The defendant was a middleman and not a culti-vator of the land. By the express terms of the kubooleut he was to have a howaldaree allowance at the rate of 4 gundas per kanee, and he agreed to make no objection or excuse in regard to the payment of rent on account of the death or absconding of tenants. Indeed, it was admitted that the holder was a middleman and not a cultivator of the land himself. In his judgment the Principal Sudder Ameen said: "It is admitted that the holder is a middleman ryot;" and he held that the tenure of the defendant was nothing more than a right of occupancy, and that he was liable to enhancement under section 17, Act X. of 1859.

He said: "The tenant or holder of such a tenure is, strictly speaking, a ryot, with a right of occupancy, whether he cultivates the land himself, or sublets to others, and is a middleman. For enhancement of such a tenure there is no other law but section 17 of Act X. of 1859, which is necessarily applicable; notice under clauses 2 and 3 of section 17 served on the defendants, under section 13 of the Act, is, therefore, valid at law."

Having held that the rent was subject to enhancement, he proceeded to try to what extent it ought to be enhanced. There was a contest before him as to what quantity was within the boundaries specified in the kubooleut; but he considered it entirely immate-rial, and held that all the cultivable lands, whether included within the boundaries or not, ought to be assessed at the same rate. He found that, instead of Rs. 5 per kanee (the plaintiff having claimed 16 by his notice), the rent ought to be 10 rupees 10 annas; and after deducting the howaladaree allow-ance at the rate mentioned in the kubooleut, there were 16 drones 10 kanees and 17 gundas of culturable land fit for assessment (p. 415), and that the jumma, according to that rate, was Rs. 2,881, 11 annas 7 pie. He held that the defendant, being a middleman, ought to have an allowance of 10 per cent. for collection. Deducting that allowance, he considered that the jumma should be enhanced to Rs. 2,599, 12 annas 11 pie, and gave the plaintiff a decree for the amount, with inter-est.

Upon appeal from that decision, the High Court held that, according to the terms of the kubooleut, there was a grant from the plaintiff to the defendant of a permanent tenure at a fixed rate of rent, and that the plaintiff's suit ought to be dismissed.

Mr. Justice Bayley, in delivering his judgment, said:—

"It is impossible, I think, to read this kubooleut without coming to the conclusion that the intention of the parties was that the lessee should clear and cultivate jungle waste on the terms of merely rent-free, or partly progressive jumma allowed in those cases (and not in the case of cultivated lands), and that the full customary rent of Rs. 5 per kanee from 1264 was thereafter to be paid. I cannot think it reasonable or borne out by the deed that the lessor intended to prescribe, or the lessee intended to accept, terms such as that the lessee should bear all the expense and trouble of reclamation, and having done so, was, in the first year after the full rent would be paid, *viz.*, after 1264, to be liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rates of neighbouring cultivated lands as to which no jungle waste had to be cleared."

The kubooleut did not contain the term "mokurruree," or the words "from generation to generation," or any word to that effect, and the kubooleut was one of modern date, and there was not, as in Dhunput Singh's case,* any long uninterrupted enjoyment at a fixed unvarying rent. It was however admitted by both parties on argument that the tenure was a permanent one. It is unnecessary for their Lordships to express any opinion upon that point, and they, therefore, abstain from doing so. Looking at the words of the kubooleut, their Lordships are of opinion that it was the intention of the parties that, in and after the year 1264, the defendant should hold at the fixed rent of Rs. 5 per kanee, and that consequently the rent was not liable to enhancement beyond that rate. It appears from the recital in the kubooleut that the defendant applied for a howaldaree amulnama at the rate of Rs. 5 a kanee without any rent for the year 1260, and at varying rates less than Rs. 5 a kanee up to, and inclusive of, 1264, and that a howaldaree amulnama had been granted according to the defendant's prayer. The rent was to be payable by certain instalments, and the defendant agreed to pay it after 1260, year by year, and month by month, according to the instalments mentioned in the kubooleut. In applying for an amulnama at the rate of Rs. 5 a kanee, it could not have been intended that the Rs. 5 should be the rent for the year 1264 only; it is a much more reasonable construction to hold that Rs. 5 a kanee was intend-

* 9 W. R., P. C., 3.

ed to be the rent for 1264, and during remainder of the holding. The defend as a middleman, might be ruined if he liable to have his rent enhanced in the m ner contended for by the plaintiff. By terms of the notice it was proposed enhance his rent from Rs. 280, the amo fixed for the year 1264, to Rs. 5,120 the year 1272. The notice was dated 19th Cheyt 1271, and was served on 25th or 26th, not many days before the of that month. It does not appear what the defendant was receiving from his ry but he could scarcely have had time bef the end of the month of Cheyt to serve ryots with notices of enhancement for 12 yet, according to section 13, any notice f him to his ryots to be available for 1 must have been given before the end of Ch 1271.

Their Lordships are of opinion that rent was not subject to enhancement bey Rs. 5 a kanee. The defendant might liable under Regulation XI. of 1825, clau of section 4, to pay rent for the lands gai by alluvion; but this is not a suit merely recover rent for those lands, or to assess th but it is a suit to enhance the rent of defendant, under section 17, Act X. of 18 upon the ground that he was liable enhancement under that section. The defe ant was a middleman, and not a ryot, ha a right of occupancy within the meaning section 17, Act X. of 1859, or liable enhancement under that section. If liabl enhancement at all, he could only be enhan according to the pergunnah-rate of the re payable by similar holders. (Dhunput Sing case, 11 Moore's Indian Appeal Cases, p 265,* and the case there cited with appro tion.)

Their Lordships consider that this obje tion is fatal to the whole of the plaintiff's ca In Dhunput Singh's case it was said: "T assess an intermediate tenant according to t rent paid by ryots, must necessarily depri him of all beneficial interest in his tenure According to the tenure of the defendant the present case, he was not to make any jections on the ground of drought, inundatio death of tenants, absconding of them, sa land, fitness or unfitness for cultivation, c tivated or not cultivated, or the like. H could not at any rate be liable to any high rent than holders of tenures upon those ten

In the present case, if the defendant liable, under clause 3 of section 17, to

* 9 W. R., P. C., 3.

ssessed for land gained by alluvion beyond the oundaries mentioned in the kubooleut, upon e ground that the land held by him had een found upon measurement to be more han that for which he had previously paid ent, he would be liable to pay rent for the nd outside the boundaries mentioned in the ubooleut, even though it might be sandy or nfit for cultivation.

It was contended on the part of the apellants that, even if they were not entitled enhance the rent, they were entitled to cover rent at the rate specified in the ubooleut. Their Lordships are of opinion at a suit to enhance is very different from uit to recover arrears of rent at the rate iginally fixed, and that it is founded entire upon different principles. To a suit for hancement it would be no bar to plead that arrears according to the original rate had en paid. No issue was raised, nor could issue have been properly raised in this it as to whether the rent for 1272 at rate specified in the kubooleut had been id or satisfied; nor is there anything in the e to show whether it has been paid or not. eir Lordships are of opinion that the intiff is not entitled to a decree in this it for the rent of 1272 at the rate fixed by kubooleut. They concur with the High urt in thinking that the present suit ought be dismissed with costs, and they will refore humbly advise Her Majesty that decree of the High Court be affirmed h the costs of this appeal.

The 7th February 1873.

Present:

e Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

veyance to Mookhtear without Consideration —Pleading—Vendor's Fraud.

Cases Nos. 514 and 516 of 1872.

rial Appeals from a decision passed the Subordinate Judge of Bhaugulpore, ated the 21st December 1871, affirming decision of the Moonsiff of Soorujgurrah, ated the 20th September 1869.

Lalla Huree Lall and another (Plaintiffs), *Appellants,*

versus

Kooldeep Singh and others (Defendants), *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Appellants.

Baboos Annoda Pershad Banerjee and *Anund Chunder Ghossal* for Respondents.

On 25th July 1866, M C K executed a kobala purporting to convey certain properties to R L (her mookhtear) whose representative (appellant in Case No. 514) by a deed, dated 15th September 1867, conveyed a portion of the property to the appellant in Case No. 516, who now claims to be the prior purchaser for valuable consideration without notice. By deed dated 17th September 1867, M C K conveyed the property to respondents who were in receipt of rents at the time when the two appellants instituted suits to recover possession of the property, and to set aside the deed, the ticcadar and M C K being also made defendants.

HELD that the conveyance by the native lady to her mookhtear without consideration could not be upheld, for to uphold it would be a denial of justice and contrary to sound policy, even if the grantor as plaintiff sued the mookhtear as defendant to set it aside. Still less could it be upheld in a case like this, where the parties pleading the fraud were defendants and in possession.

Pontifex, J.—THESE two cases were originally heard together before the Moonsiff. They were subsequently heard on appeal together, and have twice before the present occasion been brought together before the High Court on special appeal, and twice remanded. On each occasion they have been treated as depending on each other, and one judgment only has been passed in both cases. The same grounds of appeal have been taken in each case in the present applications to the High Court in special appeal; but in argument Mr. Gregory, who appears for the appellants in each appeal, has endeavoured to distinguish between the two cases, and now for the first time raises the question that No. 516 does not depend upon No. 514, and urges that the real point in No. 516 has never been tried, namely, that the appellant Khem Narain is a purchaser for valuable consideration without notice and prior in date to the purchase by the defendants. We observe, however, that in the second remand-order of the 7th of June 1871, it is stated by the learned Judges that "it is admitted by both parties that these two special appeals will be governed by one and the same decision."

The facts of these cases are shortly as follow:—

On the 25th of July 1866, Mussumat Manick Chand Kooer executed a kobala of that date, purporting to convey to Rung Lall, who was her mookhtear, certain properties, including the properties which are the subject of these appeals, for an alleged consideration of Rs. 3,100.

The appellant in No. 514, who is the brother and representative of Rung Lall, alleges that Rung Lall, on the 10th of October 1866, let out part of the property in ticca to two of the defendants (who do not appear in these appeals before us, and who are not purchasers under the deed of the 17th September 1867 sought to be set aside, but who are alleged to be relations of the respondents) from 1272 to 1284; and further that Rung Lall, on the 15th of January 1869, sold part of the property to three of the defendants who do not appear before us, and who were not purchasers under the deed of 17th September 1867; and the appellants rely upon such lease and sale as a recognition and admission of Rung Lall's title.

By deed ostensibly bearing date the 15th September 1867, but not registered until the 27th of September 1867, the appellant in No. 514 purported to convey part of the property to Khem Narain Singh, the appellant in No. 516, who now, for the first time before us, insists that he occupies the position of a purchaser for valuable consideration without notice prior in point of time to the respondents.

By deed dated the 17th September 1867, and registered on the 19th of September 1867, Manick Chand Kooer conveyed the property, the subject of these suits, to the present respondents, and at the date of the institution of the suits, they were in receipt of the rents. The appellants in Nos. 514 and 516 respectively instituted suits to recover possession, and to set aside the deed of 17th September 1867, insisting that the respondents' possession was under the ticca of the 10th October 1866. The ticcadars under that deed and Manick Chand Kooer were also made defendants. Manick Chand Kooer in her written statement admitted the sale made by her to Rung Lall, and denied the sale to the respondents.

The respondents pleaded that the conveyance to Rung Lall was without consideration, and had been executed by Manick Chand Kooer to him as her mookhtear, in order to avoid execution-proceedings under a decree then lately passed against her; and further that no possession was ever obtained unde the alleged ticca granted by Rung Lall, bu that, on the contrary, possession had bee held, and continued to be held, by ticcadars o Manick Chand Kooer under a pottah executed by her, and extending from 1271 to 1282.

The Moonsiff found that, when the kobal of 25th July 1866 was executed, no consideration passed; that a decree, dated the 20 of June 1866, had been passed agains Manick Chand Kooer; and that the convey nace by her to Rung Lall, her mookhtear, wa benamee to defraud her judgment-creditors He further found that Rung Lall never ha possession under the deed; that no possessio passed under the pottah alleged to have bee executed by him; and that from 127 Adawut Singh, the ticcadar of Manick Cha Kooer, held possession throughout.

The Moonsiff had fixed a fifth issue w respect to the validity of the respondent deed of conveyance of the 17th Septemb 1867, and evidence seems to have be adduced on such issue; but the Moons having decided that Rung Lall's conveyan was fictitious, and that no possession pass under it, declared his opinion that it w unnecessary to give judgment on such iss

From this decision governing both su the appellants appealed to the Subordin Judge of Bhaugulpore, who reversed t Moonsiff's decrees; but, on special appeal the respondents, the High Court remand the suit as having been improperly tried the Lower Appellate Court. Such Court remand reversed its former decision, and the upon the present appellants preferred a sp cial appeal to the High Court, which, on 7th June 1871, again remanded the case the grounds that the Lower Appellate Co had failed to consider the effect (if any) the lease of the 10th October 1866 and conveyance of the 15th February 1867 a recognition of the title of Rung Lall by respondents; that it had also failed to consi whether the respondents' possession w under the lease of 10th October 1866; tha had further failed to consider the effect of admission of Rung Lall's title by the defe ant Manick Chand Kooer, and because had made an obvious mistake with respec a certain mokurruree pottah which had be granted by a different proprietor.

On the second remand, the Subordi Judge (the successor of the Judge who h that office on the two previous occasions w the appeal and first remand were consider upheld the decision of the Moonsiff.

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Upon this occasion, the appellants' pleader or the first time urged that the defendants ould not rely on the fraudulent character of he conveyance to Rung Lall, inasmuch as hey claimed title under Manick Chand Kooer, party to the alleged fraud, and, therefore, ere precluded from pleading the fraud.

The Lower Appellate Court gave one judgment in the two appeals, and thereby istinctly found on the evidence that the resent respondents are in no way affected by he pottah of 10th October 1866, and that ch pottah was collusive; that the payment f the consideration-money by the defendants nder the deed of the 17th September 1867 as distinctly proved; that the plaintiffs had iled to establish the payment of any conderation under the deed of the 25th July 866, which deed it found to be a mere enamee transaction under which no possesion passed; and that the admission made by anick Chand Kooer with respect to the lidity of the deed of 25th July 1866 was llusive. The judgment of the Lower Apellate Court concludes as follows: "As both he kobalas propounded by the appellants n the two cases (meaning the deeds of 25th July 1866 and 15th September 1867) are of one and the same nature, that is to say, the payment of the consideration-money stated in the kobalas and the plaintiffs' possesion have not been proved to the satisfacion of the Court, the claim of both the laintiffs must be dismissed."

Against this decision the plaintiffs in the o suits have preferred special appeals, ing the same grounds of appeal, which, so as they were urged before us, are subntially as follow:—

st.—That the respondents are precluded m questioning the title of the appellants, smuch as they are bound by their recogion of such title under the lease of 10th tober 1866, and the conveyance of 15th bruary 1867.

nd.—That the respondents ought not to allowed to plead the fraud of their vendor support of their title derived through her.

rd.—That the admission of the appelts' title by Manick Chand Kooer in her itten statement was a sufficient corroboraof such title. And in argument Mr. gory has also raised the questions that appellant in No. 516 is a purchaser for able consideration without notice and in date to the respondents' purchase, has urged that this fact has not been idered by the Lower Appellate Court, and her has urged that there was no issue before the Lower Appellate Court under which it could try whether any consideration passed under the deed of 17th September 1867, and that its decision on that point is therefore without foundation, and that, until the payment of such consideration is proved, the respondents' title must be considered invalid.

We are clearly of opinion that the decision of the Lower Appellate Court must be confirmed, and these appeals dismissed. With respect to the first of the abovementioned grounds of appeal, the Moonsiff and the Lower Appellate Court have distinctly found that none of the present respondents were parties to the lease of the 10th of October 1866, or the conveyance of the 15th February 1867, and that possession did not pass under the lease, and that there has been no recognition by the respondents of the appellants' title. We think such finding is correct.

With respect to the second ground of appeal, Mr. Gregory has relied on the observations to be found in a case reported at 3 Weekly Reporter, page 92, in which reference is made to a case decided by the late Sudder Court on the 28th of December 1859. But in the case reported in 3 Weekly Reporter, it was the plaintiff who, being out of possession, sought to set aside a fraudulent deed to which his vendor had been a party, and the case therefore fell within the rule, "*In pari delicto fortior est conditio possidentis et defendentis;*" while in this case the respondents who plead the fraud are in possession and defendants. The *dictum* of Lord Mansfield in the case of Montifiori *vs.* Montifiori, 1 W. Blackstone, page 352, "that no man shall set up his own iniquity as a defence any more than as a cause of action," has not of late years been approved of as appears by Baron Bramwell's judgment in Bours *vs.* Foster, 27 L. J., C. P., page 266, and the cases cited at page 109 of the 1st volume of Taylor on Evidence (6th edition), to which may be added the case at page 551 of 13 Moore's Indian Appeals; Williams *vs.* Bayley, 1 Law Reports, House of Lords, page 200; and Reynell *vs.* Sprye, 1 De Gex, Macnaghten, and Gordon 678.

In the present case, where a conveyance was made by a native lady without consideration to her mookhtear, it would be a denial of justice, and contrary to public policy, to uphold the deed, even if the grantor, as plaintiff, sued the mookhtear as defendant to set the deed aside.

With respect to the third ground of appeal, we are satisfied that the Lower Appellate Court has arrived at a correct decision

when it found the admission relied upon to be conclusive and unreliable.

We further find that the Lower Appellate Court has distinctly decided upon the evidence that the conveyance to the appellant in No. 516 was made without consideration, and that no possession passed under it; and we are of opinion that the validity of the respondents' conveyance was sufficiently raised in the 5th issue before the Moonsiff; and that although he did not think it necessary to give judgment on the point, evidence was taken under that issue, and, upon such evidence the Lower Appellate Court has distinctly found the respondents' conveyance valid, that the purchase-money was duly paid thereunder.

We dismiss both these appeals with costs.

The 8th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

High Court—Powers of Superintendence—Ministerial Officers—Act VI. of 1871, ss. 35 and 36.

In the Matter of

Akbar Ali, *Petitioner.*

Moonshee Mahomed Yusuf for Petitioner.

With reference to the rule that its extraordinary powers of superintendence should not be exercised except for the purpose of protecting a complainant in a matter wherein otherwise he would not be able to obtain redress, and where the applicant showed himself worthy of its interference, the High Court declined to interfere on behalf of a party who complained that a District Judge had acted *ultra vires* in dismissing him from the post of serishtadar of the Moonsiff's Court, seeing that it was open to the applicant, under the Civil Courts Act, to seek his remedy from the Local Government.

Phear, J.—In substance the petitioner in this application complains that the Judge in dismissing him from the post of serishtadar of the Moonsiff's Court, has been wrongly exercising functions which belong only to the Moonsiff himself, subject to appeal to the Judge and to the other provisions of sections 35 and 36 of the new Civil Courts Act, and he asks us generally to cancel the order with the view, I suppose, to our setting the proceedings right.

There may be a question having regard to the terms of the sections 35 and 36 of this Act, which vest a general control in this matter in the Local Government, whether we have or have not jurisdiction to make such an order as that which is asked of us. I am rather disposed to think that, in the absence of express words of exclusion, the jurisdiction which is given to us by section 15 of the Charter Act, and repeated, I may say, in this Act, would enable us to keep judicial officers to the exercise of their proper functions if it appear to us that they had deviated from their duty in this respect, notwithstanding that these functions might be such that an order duly made in exercise thereof is not subject to being reviewed by this Court. But it is not necessary for me to give a judicial opinion on this point, because it is, I may say, a rule of this Court that we should not exercise these extraordinary powers of superintendence excepting for the purpose of protecting a complainant in a matter wherein otherwise he would not be able to obtain redress coupled with the further qualification that the applicant must show himself worthy of the interference of the Court.

It appears to me in this case, upon the petition which is before us, and the documents thereto annexed, that it is very possible the Judge has exercised a wise discretion on the merits. But, whether this be so or not, our refusal to exercise the powers of superintendence, if they extend so far as it is urged that they do extend, does not deprive the petitioner of the more direct means which Act VI. of 1871 gives him of obtaining a remedy for his grievance, namely the right of going to the Local Government itself. As he certainly has this course open to him, and on the ground which I have already mentioned, I do not think we ought now to interfere.

The application is rejected.

Ainslie, J.—I am doubtful whether, when the 6th Chapter of the Civil Courts Act reserves the final decision of all questions relating to ministerial officers to the Local Government, this Court can make any order to the Judge for the re-appointment of the petitioner; and, if such order cannot be made it seems to me that our interference must be infructuous.

However, it is not necessary to consider this point further at present, as I concur in rejecting this application on the ground stated by my learned colleague.

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The 23rd January 1873.

Present:

ir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

eed of Sale—Consideration-money—Onus probandi.

On Appeal from the High Court of Judicature, North-West Provinces of Bengal.

Nawab Syud Allee Shah

versus

Mussamut Amanee Begum.

In a suit to recover the balance of purchase-money eged to have been due upon the sale of a decree, ere plaintiff's case was that the consideration-money s not paid, but a *rooqua* given for it, payable when mutation of names took place:

HELD that the *onus* of proving non-payment was own upon plaintiff in consequence of the acknowgments she had made of the receipt of the whole rchase-money, *viz.*, an admission which was made, d recorded under Act XX. of 1866, at the time when deed was registered, and again an acknowledgment de in the petition presented to the Court which made decree for mutation of names.

Although, when a deed of sale containing an acknowgment of payment is written, payment is not made, may become an acknowledgment afterwards, *i. e.*, en the deed is handed over.

THIS was a suit brought by the respondt Mussamut Amanee Begum, against the wab Syud Allee Shah, to recover a sum Rs. 13,000 as the balance of the purchaseoney which, she alleges, was due to her on a sale made by her to the Nawab of a cree which she had obtained in the Courts India. Her statement is that the price ich was agreed to be paid by the Nawab the decree was Rs. 14,000; that she reived Rs. 1,000 only of that amount, and at the remainder was left in the hands the Nawab. She not only denies the yment in fact, but she sets up an affirmae case. She says that a note under the l of the Nawab was given to her for 13,000, which was to be paid off when mutation of names took place. Therefore, her case is that the consideration-money s not paid, but a *rooqua* given for it, payle when the mutation of names took place. ow, although, in a general way, it may be d that the proof of the payment of the conderation lies upon the party who asserts payment, their Lordships think that in s case the *onus* of proof was shifted and own upon the respondent in consequence the acknowledgments she had made of receipt of the whole purchase-money. Their Lordships think it is impossible to say that all those acknowledgments are merely formal; some of them seem to have been regular admissions made in a formal way of the receipt of the money, and which were intended to be and were acted upon.

The deed of sale bears date on the 1st of February 1868. It contains the agreement to sell the half of the decree, that half being stated to be Rs. 16,956, and it contains an acknowledgment of the payment of the whole consideration. Now it is to be observed that this acknowledgment may, after the deed has been delivered over or registered, amount to an admission of the payment; although, at the time when it was written, payment obviously was not made, for it is written in with the rest of the deed, and the deed was clearly written and executed by the respondent before the money was paid. However, that is perfectly consistent with its afterwards becoming an acknowledgment of the payment of the money, because, although the money was not paid at the time the deed was written, and whilst the deed remained in the hands of the respondent or of her agent, it was of course inoperative for any purpose, it may be inferred that the deed would not have been handed over until the money was paid; but undoubtedly it would seem from the observations of the Subordinate Judge and the Judges of the High Court that it is not unusual that such deeds should be handed over, although the consideration-money be not paid.

But the acknowledgment of the payment of the whole purchase-money does not rest upon the deed of sale; on the contrary, there are two subsequent acknowledgments which appear to their Lordships to be entitled to greater consideration and weight. The deed was registered on the 17th February, a fortnight after its date, and at the time of the registration, Abdool Humeed, who was the agent of the respondent and her son-in-law, made an admission, which is recorded, that the whole consideration-money was received "in cash in a lump." It appears that that admission is one which, if made, the Indian Registration Act of 1866 requires the Registrar to record. The 65th section of that Act, which relates to the procedure on admitting the registration, enacts that "on every docu-"ment admitted to registration there should "be endorsed from time to time the follow-"ing particulars;" and amongst the particulars is this: "Any payment of money or "delivery of goods made in the presence of

"the registering officer in reference to the "execution of the document, and any admis-"sion of receipt of consideration made in "his presence in reference to such execu-"tion." Thus the Legislature has thought it desirable that the public register should contain a record of any payment that takes place in the presence of the registering officer, and of any admission of payment made in his presence in reference to such execution, and requires him to record it. The acknowledgment was made and recorded in pursuance of this Act, and the presumption ought to be in favor of the truth of such a public declaration, requiring cogent and convincing evidence to rebut it.

Their Lordships do not say that an admission so made is conclusive, but still it ought to afford a strong presumption of truth, and throw upon him who makes it, when he comes to impeach such an acknowledgment, the burden of satisfying the Court, by strong and cogent evidence. that it was made under some circumstances of mistake or error. Nothing of the kind appears here, and one does not see why the admission should have been made in this case unless it were true, because it was not necessary for the purpose of the registration, the Act only requiring that, if the admission be made, it shall be recorded.

But the evidence of acknowledgment does not stop there. A further act was necessary to perfect the title of the appellant, namely, the mutation of names in the Court which had given the decree, and, accordingly, on the 3rd of March, a petition was presented to that Court by Abdool Humeed, which again contains an acknowledgment of the payment. That petition states the sale of the decree, and contains an allegation that the Mussamut had received the consideration-money from the purchaser, who had become the proprietor of her half share, and upon that petition her name was expunged, and that of the purchaser of the decree recorded in her place. There seemed to be again no necessity for making this acknowledgment, for the name might have been changed, for anything which appears, without such a statement, but it is made, and that so late as the 3rd of March, more than two months after the transaction.

It seems, therefore, to their Lordships that the *onus* was thrown upon the respondent to prove that the money was not paid. She sets up that this *rooqua* was given, and that the money was to be paid when the mutation of names took place, and was not paid. Then her case is that, in the following October, the Nawab came to her Moulvie, and asked him for the note, as if he was going to pay it off, and, having obtained possession of it, said, "I cannot pay it until you come to Meerut;" and when the Moulvie went to Meerut, he refused to pay at all. That, no doubt, would be a gross fraud on the part of the Nawab, but fraud is not to be presumed, and must be proved by satisfactory evidence. The evidence is of the most meagre description. The witnesses who speak to the Nawab having thus obtained possession of the note do not say that any remonstrance or any objection was made at the time. They simply say that he so obtained the note, and then said, "Come to Meerut, and it shall be paid."

The Nawab, who was examined as a witness, was asked no questions upon the subject in cross-examination. It seems to their Lordships that the Judge of first instance came to the right conclusion in finding that he could not give credit to the story of the note. Then, if credit cannot be given to that transaction, it seems to their Lordships that none can be given to the rest of the case of the respondent. She has set up an affirmative case which is entirely untrue, and when that has been done, there is the strongest inference that the fact of payment which that affirmative case was intended to refute is a fact which, but for the attempted refutation, she knew would be established against her by the evidence upon the other side. When we come to the evidence of the fact of payment, witnesses are called on both sides, and observations may be made on some of them. They were connected with the parties on the one side or on the other, and if the case rested on their testimony, it would be very difficult to say which set of witnesses should be credited; but after the admissions which have been made, supposing their Lordships were left in doubt upon the evidence, they could not find for the respondent.

It is not unimportant to observe that the Nawab, who is a gentleman of rank, went into the witness-box on this occasion, and gave his testimony, and of course offered himself for cross-examination. Their Lordships have often said that it would be very desirable if native gentlemen would do this more frequently, because presumptions are necessarily made against them, if when parties in a Court of Justice, and facts are in dispute, the knowledge of which must rest with them, they will not present themselves

he Court to state their own evidence and wledge of those facts. Presumptions necessarily made against persons who not subject themselves to examination n a *primâ-facie* case is made against n, and when by their own evidence they ht have answered it. However, in this e, the Nawab certainly did present him- as a witness, and he has stated in the t distinct manner that the money was l.

Upon the evidence, therefore, as it stands present, their Lordships think that the ondent has entirely failed to show that acknowledgments of her agents are un- , and that the money was left unpaid. Subordinate Judge seemed to have felt e doubt as to his having got at the truth he transaction. He doubted whether it a real transaction such as the documents esent; but, if it were not, still the re- dent would not be entitled to recover the 13,000. If the transaction was not a one, then, of course, it never could have n intended that the Rs. 13,000 should be , but after all that is a mere suspicion; parties were content to treat the trans- on as a real one, and Courts of Justice not act upon suspicion when both parties e before them so treating it. They must regard the evidence which is brought rd on either side according to the rules ch usually guide the Courts in the consi- tion of issues and the evidence brought upport them.

The Judges of the High Court have scarce- one at all into the consideration of the ence, but, treating the evidence on both s as doubtful, they have drawn an infer- e from an agreement that was subsequent- made between the parties—an inference trongly in favor of the respondent that think they can rest their judgment upon nd reverse that of the Subordinate Judge. ir Lordships, upon looking at that docu- t, cannot say that in one aspect such an rence may not be made; but, on the other d, inferences may be made from it, which port the case of the appellant. No bt it is a document which cannot alto- her be accounted for. It seems that, in original deed of sale, there had been a se to the effect that, if the decretal money not realized, the property of the respond- should be liable to make good the con- ration for the sale to the Nawab. It is d that that clause was struck out at the cution of the deed by the Moulvies of the es from some misunderstanding, or from the fact of one having over-reached the other; but undoubtedly it appears to have been struck out by consent, for both Moulvies signed the memorandum in the margin that that was so. After the registration and the mutation of names had taken place, a fresh agreement was signed by the respondent on the 1st of April, the object of which is said to have been to restore the clause which had been so struck out. Apparently in words the clause goes further, for it seems to make her property liable, not merely for the consideration-money, but for the whole amount of the decree. However, in a subsequent proceeding, both parties appear to have treated this agreement as only restoring the original clause, and making her property liable for the considera- tion-money. The High Court dwelt a good deal upon the agreement as a new and in- creased liability that she took upon herself, and, as there was no consideration for her in- curring it, their inference is that she did it in order to obtain payment of this money. If the clause is literally taken, it would be no doubt a very unwise agreement, because she was undertaking a much larger liability; and Rs. 13,000 was an inadequate consideration for what she was doing. But, if it really was her intention in signing it to get the Rs. 13,000, the question immediately occurs why did not she obtain it? She had this docu- ment in her own hands, and if the Nawab was reluctant to pay this money, she might have said: "Well, I will give you this agree- "ment. I want the Rs. 13,000. I will give "you this agreement if you will pay me." But this was not done. Therefore, it seems that no strong inference can arise in her favor from the circumstance of her having made it; and, on the other side, the appellant says: "If the money had been unpaid, why was not "some reference made in this agreement to "the fact that it was unpaid." From the omission to do so, it is inferred on his part that the money was not really due at that time, otherwise some mention of it would have been made in this fresh document drawn up long after the time when, according to the statement of the respondent, the money ought to have been paid.

It is also not unworthy of observation that, from the time when it is said this money ought, according to the respondent's own case, to have been paid, namely, in March, it is not pretended that any demand was made for it until October, although we must assume that the respondent was a needy woman.

Upon the whole, therefore, their Lordships think there was not sufficient ground for dis-

turbing the first judgment of the Subordinate Judge, and they will humbly advise Her Majesty to allow this appeal, to reverse the decision of the High Court, and, in lieu thereof, to order that the appeal to the High Court be dismissed, and the judgment of the Subordinate Judge be affirmed, and that the costs, if any, paid by the appellant to the respondent in the Court below should be re-paid. Their Lordships, in this case, say nothing about the costs of this appeal, as they understood that the suit was prosecuted below as a pauper-suit.

The 31st January 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Deed of Conveyance—Execution—Right of Action.

Case No. 677 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 9th January 1872, affirming a decision of the Moonsiff of Bulia, dated the 5th March 1871.

Chukroo Singh (Plaintiff), *Appellant,*

versus

Jowahir Singh and others (Defendants), *Respondents.*

Baboo Boodh Sen Singh for Appellant.

Moonshee Mahomed Yusuf for Respondents.

Where the vendee, after arranging with the vendor to pay up the balance of the consideration-money due on a deed of conveyance, by writing up satisfaction of a decree which he held against the latter, took out execution, and recovered under the decree, the vendor taking no steps to notify the arrangement to the Court at the time of execution:

HELD that, if the vendee executed contrary to the terms of the deed, the vendor may have a remedy by a separate action.

Kemp, J.—THIS appears to be a clear case. It has been found by both the Courts on the evidence that the khas lands passed under the deed of conveyance to Mozuhur Ali, who subsequently leased them to Rowshun Lall. This finding, we think, is correct. After declaring the deed of conveyance to be genuine, the Court also found that Mozuhur Ali, the vendee, was in possession of the lands conveyed.

It is now contended in special appeal that the whole of the consideration-money recited in the deed of conveyance was not received by the plaintiff. It is admitted by him that a portion of the consideration money amounting to Rs. 23 was received in cash, and that, for the balance, or Rs. 274-8, it was arranged between the parties that Mozuhur Ali, who held a decree for the amount against his vendor, the plaintiff, was to write up satisfaction of that decree, and that the vendee, instead of doing so, took out execution, and recovered under that decree. It may be that the Court would not have recognized this mode of satisfaction out of Court; but it is very clear that the plaintiff took no steps to notify this arrangement to the Court at the time that Mozuhur Ali took out execution, which he might have done by filing the deed of conveyance, and proving that such an arrangement had been made between the parties.

If Mozuhur Ali had executed his decree contrary to the terms of the deed of conveyance, on which point we express no opinion, the plaintiff may have a remedy by a separate action.

The special appeal is dismissed with costs.

The 10th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Decree—Construction—Costs—Interest.

Case No. 224 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 2nd May 1872.

L. P. D. Broughton (Judgment-debtor), *Appellant,*

versus

Rajah Saheb Perhlad Sen (Decree-holder), *Respondent.*

Baboo Kalee Prosunno Dutt for Appellant.

Mr. R. E. Twidale and *Baboo Tarucknath Dutt* for Respondent.

Where a decree was passed awarding plaintiff's claim "with usual costs and interest," without any specification of the costs intended, save the mention of some items in the schedule, and without mentioning the rate of the interest or the date from which it should run, was HELD that the decree was meant to give all the costs which the successful party had incurred in the prosecution of the suit from the commencement until the date

the final decree, including costs incurred in the abortive part of the proceedings, *i. e.*, in trials set aside; and that the interest was to be at 12 per cent. on the amount of money actually decreed.

Phear, J.—In this suit, the plaint, which was, we believe, filed somewhere in December 1861, sought, among other things, to recover possession of certain mouzahs on the allegation that the plaintiff had been dispossessed thereof in 1856; also to recover mesne-profits, and further to recover a sum of Rs. 189-11 annas and 3 pie, collection-money deposited in the Collectorate, and appropriated by the defendant.

The suit appears to have passed through some vicissitudes of fortune: it was up twice in the High Court, then went to the Privy Council; it was remanded by the Privy Council to this country for re-trial; re-trial was had and decree passed in December 1869; and from that decree an appeal was preferred to this Court, which was dismissed for default. The decree passed by the Zillah Court in December 1869 was in favor of the plaintiff. In his judgment the Judge simply said that he decreed the claim of the plaintiff with usual costs and interest. And the formal decree, which was afterwards drawn up upon his judgment, after reciting certain heads of the plaintiff's claim, states that the following order and decree was passed, namely, that it be ordered "that a decree be passed in favor of the plaintiff awarding the claim with usual costs and interest." To this formal decree a schedule was appended, in which, under the head of costs of the plaintiff, are included three items, as follow :—

Rs. 820 and 15 annas on account of costs in the former judgment.

Fresh costs :—

Stamp paper, Rs. 2.

Vakeel's fees, Rs. 441 and 7 annas.

The plaintiff made application for the execution of this decree on the 2nd March 1872 by way of revival, as it has been termed, against the present representative of the original defendant. The Judge on that application ordered execution to issue for a total amount, which includes, in addition to the items which we have just now mentioned the items expressly inserted in the schedule to the original decree, further items for costs incurred in the Privy Council proceedings, the costs incurred in the High Court in the year 1864, and for interest on the sum of Rs. 189 and odd annas which formed part of the original claim of the plaintiff.

This is an appeal against that order of the Judge, and the judgment-debtor now objects that these items are not properly recoverable by the judgment-creditor in execution of that decree of December 1869. We are thus called upon to say whether this objection is well founded or not.

It is obvious on the perusal of the translation of the formal decree, which is now before us, that the decree was very loosely drawn up indeed. It does not otherwise specify the claim of the plaintiff which it purports to decree than by a recital of the principal heads of the plaint, and in that recital it omits altogether to mention so much of the plaint as was a claim for interest; moreover, it does not specify the items for costs in words, but simply says in general terms *usual costs*. And the schedule does not clear up this matter, because it only specifies some of the items of the costs incurred by the parties in the whole of the proceedings in the suit, and not all of them. This formal decree also omits altogether to mention the rate of the interest awarded, the date from which the interest is to run, and leaves it altogether uncertain whether the Court intended to award the plaintiff any interest at all upon the several items of the money claimed for any time previous to the date of the decree. It is quite clear that all uncertainty of this kind ought to have been prevented, and would have been prevented, if the decree had been clearly drawn up according to the provisions of the Civil Procedure Code.

After the best consideration that we can give to the matter, it seems to us that the Judge, by using in this decree the term *usual costs*, meant to give all the costs which the successful party had incurred in the prosecution of the suit from the commencement until the date of the final decree. And if so, those costs would unquestionably comprehend the costs which have been incurred in what we may term the abortive part of the proceedings, namely, in the trials had in the different Courts which were set aside by the Privy Council; it would also include the costs of the Privy Council proceedings as well, because the Privy Council directed that those costs should be treated as costs in the cause, and the Judge does not deal with them separately from the rest.

It is no doubt very unfortunate that the formal decree omitted to make this clear beyond all doubt; and it is also very unfortunate that the schedule which ought to contain all the items of costs only specified three of them.

Then, as to the interest, it is at least doubtful whether the Judge intended the word

usual to be coupled with the *interest* as well as the previous word *costs*. On the whole, however, we suppose he must have intended it to be coupled with the interest, for otherwise there is nothing in the decree at all to specify in any way what was the rate of interest intended to be decreed. And we further suppose that the usual interest at the date of this decree was understood by the Judge to be 12 per cent. But we can only attach the interest thus decreed to the amount of money which was actually decreed. We cannot gather from the words of the decree that it was the judicial intention of the Court at the time of passing the decree to award interest upon the different parts of the plaintiff's claim as from a date anterior to the date of passing the decree; for no date is expressly mentioned, and the claim which the plaintiff made in his plaint for interest is not among the heads of claim which the decree specifies.

It appears to us, therefore, that, in the execution of this decree, the costs awarded must be considered as the costs of all the proceedings in the suit, including those which have been objected to before us, and that the interest awarded must be considered to be interest at the rate of 12 per cent. per annum upon the total amount decreed from the date of the decree.

It seems to us further that, as regards the costs of this appeal, the judgment-creditor has, in a large measure, brought the appeal upon himself by not taking care, when he obtained the decree in December 1869, that it was formally drawn up according to the Judge's intended decision in a clear and proper mode, so that all chance of ambiguity or doubt might be prevented. For this reason, we think the appellant should not obtain his costs in this appeal.

The 10th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Act XXIII. of 1861, s. 11—Execution—Mesne-profits—Jurisdiction.

Case No. 230 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 10th May 1872.

L. P. D. Broughton (Judgment-debtor), *Appellant,*

versus

Rajah Saheb Perhlad Sen (Decree-holder) *Respondent.*

Baboo Kalee Prosunno Dutt for Appellant.

Mr. R. E. Twidale and *Baboo Taruck-nath Dutt* for Respondent.

Where a decree was silent as to plaintiff's right mesne-profits after the date of filing the suit, and not reserve any question as to mesne-profits for furt investigation, the Court which executed the decree HELD to have acted *ultra vires* in ordering an investi tion into mesne-profits which may have accrued pending the suit and up to the time of execution.

Phear, J.—THIS is an appeal which ari out of the same execution-proceedings, may say, as those with which we were co cerned in the last appeal (Miscellaneo Appeal No. 224 of 1872).*

The Judge in the course of those proce ings has ordered an investigation as to mesne-profits which may have accrued (so to speak) pending the suit, and up to time of the execution. It is objected on part of the present appellant that the dec is silent as to the plaintiff's right to mes profits after the date of filing the suit, also does not reserve any question as mesne-profits for further investigation.

On reference to the decree which we h already had occasion to speak of in the ot appeal, it seems very clear that the foun tion of this objection is correct. The cree, so far as regards mesne-profits, me recites the particular claim for Rs. 5, and 8 annas, and makes no mention of other claim of the plaintiff in respect mesne-profits. And after the recital in way of the plaintiff's claim, comes the dec tal order "that the decree be passed in fa of the plaintiff awarding the claim usual costs and interest."

It is plain, we think, that the only cl for mesne-profits which the decretal or can be made to cover is the claim for t particular item of Rs. 5,202 and annas, which is recited by way of indo ment to the order; and unquestionably decree does not in terms reserve any qu tion with regard to the mesne-profits adjustment in the execution of the dec Now, it has been held by this Court i tolerably long series of decisions, and also

* See case immediately preceding this.

Bombay High Court in a Full Bench ision, that the Court which is called upon xecute a decree cannot, in the execution-eedings, inquire into any question of ne-profits or enter upon any investigation he amount of mesne-profits which has been the subject of the decree itself. powers in this respect which the Court ged in executing the decree possesses given by section 11, Act XXIII. of 1.

fell to us in a case, which is reported in 10 Weekly Reporter, page 62, to discuss me length the effect of the provisions of ection. We mention this fact, because lieves us from the necessity of now g in detail upon this question. In that the Division Bench held that "the t part of the section refers to mesne-fits which, although they have been the ject of decree, have not been ascertain-by the decree, but have been directed to adjusted in execution; the second part rs to mesne-profits which have been t only the subject of decree, but actually ertained and made matter of specific er and direction." We find it con-nt to repeat these words, because we re to the views expressed by them.

e question which the Judge in this case ed to be inquired into by means of a investigation was not a question bearing mesne-profits which had been actually led by the decree; nor was it a ques-which the decree itself directed to be ed for investigation in the course of ecution, because, as we have already ked, no reservation whatever was made. therefore, think that this investigation een ordered *ultra vires*, and that conse-ly the order should be set aside. The lant must have his costs.

The 11th February 1873.

Present:

Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Agreement after Decree—Execution.

Case No. 87 of 1872.

ellaneous Appeal from an order passed the Judge of Tipperah, dated the 31st uly 1872.

Chundernath Misser and another (Decree-holders), *Appellants,*

versus

Gouree Komul Bhuttacharjee and others (Judgment-debtors), *Respondents.*

Baboos Kalee Mohun Doss and Rash Beharee Ghose for Appellants.

Baboo Nullit Chunder Sen for Respondents.

An arrangement entered into between decree-holders and judgment-debtors after partial execution cannot be subsequently set aside on the application of the judgment-creditors, upon the ground that it exposes them to certain consequences—*viz.*, the risk of incurring limitation.

Jackson, J.—THE appellants in this case held a decree against the judgment-debtors. Various applications were made to execute the decree, and on one of them, in September 1869, the sum of Rs. 1,000 was paid. Further applications were afterwards made, on which finally, on the 16th December 1870, it was arranged upon a petition of the judgment-debtors and the consent of the decree-holders that a further payment of Rs. 1,000 down should be made, and that the residue of the debt should be paid with interest at the rate of 1 per cent. per month by monthly instalments of Rs 125.

The judgment-creditors now seek to set aside the arrangement entered into by mutual agreement, and execute their original decree as if no such arrangement had been made. The sole ground on which they make this application is, that adverting to the decision of the Full Bench of this Court, reported in 13 Weekly Reporter, page 44, the agreement would expose them to certain consequences, *viz.*, the risk of incurring limitation, to which, if they had been more prudent, they would not have exposed themselves. It appears to us that this is not a ground upon which the Court executing the decree can be called upon to relieve the appellants from their solemn deliberate agreement. The parties were quite at liberty to enter into such agreement if they thought fit. There was nothing in law to prevent their doing so. Even if it were in the power of the Court in execution-proceedings to do that which is sought of it, there must be something much stronger than the mere want of complete prudence or forethought on the part of one of the parties to induce it to do so. We think, therefore, that the Judge of the Court below was quite right in refusing to allow the decree to be enforced in supersession of such agreement.

The appeal is dismissed. We make no order as to costs.

The 13th February 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Plaint—Bond—Act XX. of 1866, s. 53.

In the Matter of

Gour Chunder Mitter and others, *Petitioners,*

versus

Goluck Chunder Roy, *Opposite Party.*

Baboo Sreenath Banerjee for Petitioners.

Baboo Nullit Chunder Sen for Opposite Party.

Where plaintiff had elected to bring a regular suit in the Moonsiff's Court for the recovery of the amount due under a bond and for declaration of his lien on the property pledged thereby, the Judge was HELD to have acted without warrant in converting the plaint into an application under Act XX. of 1866, s. 53.

Jackson, J.—THIS rule must be made absolute. It is quite clear that the procedure which the plaintiff Goluck Chunder Roy elected, as by law he was quite competent to elect, was that of bringing a regular suit in the Moonsiff's Court for recovery of the amount due under the bond, and for declaration of his lien on the property pledged thereby. The petition or plaint is framed, as his vakeel before us admits, as an ordinary plaint would be, and is engrossed on a stamp of the full amount. He gave evidence to support his allegations, and when his suit was dismissed, he contended in his petition of appeal that his claim had been fully made out by the evidence which he adduced. All this clearly shows that the plaintiff never contemplated proceeding under section 53; and in point of fact, had he so contemplated, he could not have obtained a declaration of the lien which he sought. The course taken by the Judge in converting this plaint, as it really was, into an application under section 53 of the Registration Act of 1866, is entirely unwarranted, and his order must be set aside, and the rule made absolute, and the case will be remitted to the District Court of Tipperah in order that the appeal may be tried on the merits.

The 14th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Contribution—Mesne-profits—Mortgage—Ou Probandi—Evidence—Decree inter partes.

Regular Appeal from a decision passed b the Subordinate Judge of Patna, dat the 11th January 1872.

Case No. 74 of 1872.

Bahadoor Singh (one of the Defendants), *Appellant,*

versus

Afzul Khan (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Boodh Sen Singh* for Appellant.

Baboo Chunder Madhub Ghose and *Mo shee Mahomed Yusuf* for Respondent.

Case No. 82 of 1872.

Afzul Khan (Plaintiff), *Appellant,*

versus

Bahadoor Singh and others (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose and *Moons Mahomed Yusuf* for Appellant.

Messrs. R. E. Twidale and *C. Gregory* Respondents.

J obtained a decree against A, his sister W, and B, mesne-profits in respect of a share of property they had been wrongfully keeping J from enjoy After some further litigation, which resulted in con ing this decree, A sued B and other co-judgm debtors to recover money which he alleged having b obliged to pay in satisfaction of the decrees ag himself and them. B, in answer to the claim, said, during the whole time he was in possession, he held a title derived from A and the other judgment-debt A did not dispute the fact that B had entered into p session as his mortgagee, but maintained that the r of possession under the zuripeshgee had termin before the origin of J's claim:

HELD that it lay upon A to prove that it had terminated:

HELD, also, that a decree in the matter of this m gage between B and another of the defendants, i suit to which neither A nor any one privy to h title was a party, was not admissible in evidence a decision *inter partes.*

Phear, J.—IN this case, the plaintiff, Afzul Khan, sues three persons, *viz.*, Ba door Singh, Juggur Nath Singh, and Re Hossein Khan, otherwise called Kum

d

an, seeking to recover from them money ich he says he has been obliged to pay in isfaction of a judgment-debt, or rather eral judgment-debts, under decrees in ich they were with him co-judgment-tors. He specifies the decrees as being e dated the 18th December 1862, the h July 1864, the 9th January 1864, and 20th June 1866.

The lower Court has given him a decree some of the money claimed against Baha-r Singh, and for other portion of the ney against Kummun Khan; it has dis-ed his suit against Juggur Nath Singh.

The present appeal, No. 74 of 1872, is an eal preferred to this Court by Bahadoor gh against the judgment of the lower rt so far as it affects him.

It seems, upon looking at the decrees ch the plaintiff makes the basis of his m, so far as they have been explained to that the first decree of the 18th Decem-1862 was a decree obtained by the ond defendant Juggur Nath Singh against present plaintiff, Afzul Khan, his sister leehun, and the present first defendant adoor Singh, for mesne-profits in respect a certain six-anna share of property, ich those three persons were found to e been wrongfully keeping Juggur Nath the enjoyment of.

The decree of the 9th January 1864 was ecree of the High Court, dismissing an eal which Afzul Khan had preferred to it inst the decree of the 18th December 2. The plaintiff Juggur Nath Singh self had also appealed against the decision, the ground that it did not go far enough, that it ought to have made the defendants le for mesne-profits in respect of twelve as, and not merely of six annas. The h Court, upon that appeal, remanded the for further trial in the Mofussil Court; on the 20th July 1864 Juggur Nath, this remand, got a decree for further , certainly as against Kummun Khan, probably against other parties also; but this point we think it is not necessary we should look further at present; it is ugh to say that this decree of the Zillah rt is the third of those which the plaint rs to.

Kummun Khan appealed against that deci-, and his appeal was dismissed by the h Court on the 20th June 1866; and the ee of the High Court so dismissing his al is the fourth of the decrees under h the present plaintiff claims.

But while the plaintiff thus makes a general claim against all the three defendants on the ground that he, as a co-judgment-debtor with them, has been obliged to pay their share of the judgment-debts due under these decrees, he does not in his plaint specify the particular shares or proportions in which the defendants are severally bound to recoup him, or indeed state anything more than the general ground, which we have mentioned, for any liability on their part whatever.

Now, Bahadoor Singh in answer to this claim said, amongst other things, that during the whole time that he was in possession of this property, and on that account made liable to Juggur Nath Singh for mesne-profits, he held possession by a title derived from Afzul Khan, Wuleehun, and Bheekun, the mother of Kummun Khan, under a mortgage or zuripeshgee lease which had been given to him by these persons, before that other mortgage had been given to Juggur Nath by these same persons under which Juggur Nath's right to mesne-profits had eventually arisen. His answer was, in fact, this: Whatever may have been my liabilities to the third party for these mesne-profits, you cannot claim anything against me, because you originally put me into possession, and it was by virtue of the right which you yourself had given me that I was where I was. This allegation on the part of the defendant Bahadoor Singh is not traversed by the plaintiff Afzul Khan. On the contrary, he, in effect, admitted the substance of it, but contended, as we understand, in the Court below, that Bahadoor Singh's right to possession under the zuripeshgee mortgage had ceased before the period of time for which he had been made liable under the decree to Juggur Nath commenced to run, and that he was, in fact, during that period, a trespasser, and consequently solely responsible for the wassilat.

With reference to this, the Judge of the Court below states that "the plaintiff avers "that Bahadoor Singh, having held possession "of the twelve annas share decreed to Juggur "Nath, and appropriated the proceeds, was "alone liable for the mesne-profits." So he would be no doubt as between himself and the plaintiff, if he be held as a *quasi* trespasser in the manner in which the plaintiff seemed to have contended that he did hold. And consequently it appears to us that, as between the plaintiff and Bahadoor Singh in this suit, the whole merits of the case turned upon the question whether or not Bahadoor Singh was

a trespasser as the plaintiff alleged. Clearly, it was for the plaintiff himself, under the circumstances of the case, to prove the affirmative of this issue. He did not dispute the fact that Bahadoor Singh had entered into possession as his mortgagee, but he maintained that the right of possession under the zuripeshgee had terminated before the date of origin of Juggur Nath's claim; and consequently it lay upon him to prove that it had so terminated. Upon looking into the evidence on the record, it seems to us that, strictly speaking, there is no evidence bearing upon this point at all. There is no oral testimony; and the only evidence upon which the lower Court seems to have based its conclusion of fact is a certain decree of the 30th June 1866, passed by the Sudder Ameen in the matter of this mortgage between Kummun Khan, the third of the present defendants, and Bahadoor Singh, the first of the present defendants, in a suit to which neither Afzul nor any one privy to him in title was a party.

The lower Court perceived that the judgment was not, as a judgment *inter partes*, available as evidence in favor of Afzul in the present suit. But for some reason or another, which is not very clear, it nevertheless allowed this judicial decision to be used as evidence in this suit. So far as a portion of the liability of Bahadoor Singh was concerned, the lower Court appears to have thought that it was not evidence where the liability of Bahadoor Singh was in question in respect of a certain six annas, but that it was so where the liability was in question in respect of another six annas. We think, we need hardly say, that, if it was not admissible in one case, it was not admissible in the other. The lower Court was right in its view that it was not admissible as a decision *inter partes*, and it was not by its nature in any sense a decision *in rem*. This decree, then, cannot be taken into consideration by us in this regular appeal; and if that be put on one side, there is no evidence at all on the record to show at what time Bahadoor Singh's relation to the plaintiff and others as mortgagee came to an end, or indeed whether it has ever come to an end in any sense at all.

We must take it then that, during the period for which mesne-profits were decreed, Bahadoor Singh was in possession as mortgagee of the plaintiff and others just as he had been previously thereto. And if that be so, it is quite clear we think that the plaintiff has made out no right in this suit to claim from him any contribution towards the sum which he has been obliged to pay in satisfaction of the decree of Juggur Nath Singh. As things appear in this case, it certainly would be monstrous that Bahadoor Singh, whose title as zuripeshgeedar commenced some years before the title of Juggur Nath, both of them originating in the same source, should be made liable to recoup his mortgagors the amount of damages which they or one of them had been compelled to pay Juggur Nath Singh in respect of a possession and occupation of the land which they must be taken by reason of the zuripeshgee transaction to have guaranteed to him, Bahadoor.

It seems to us then that the lower Court ought to have dismissed the suit as against Bahadoor Singh. It follows that this appeal must be successful. The decree of the lower Court, so far as it concerns Bahadoor Singh, must be reversed, and Bahadoor Singh must have his costs both in this Court and in the Court below.

The next appeal, No. 82 of 1872, is an appeal preferred in the same suit by Afzul against the decree of the lower Court, on the ground that that decree has not made Bahadoor Singh liable to the extent to which he ought to have been made liable.

In this appeal, Bahadoor Singh, Juggur Nath Singh, and Kummun Khan, all three defendants, are respondents. But it is quite clear that the grounds of appeal are directed only to so much of the decision of the Court below as affects Bahadoor Singh alone. There is nothing in the petition of appeal which is a complaint against the decree of the lower Court so far as concerned Kummun Khan. It follows then from what we have already said in reference to the first appeal that this appeal must be dismissed. Inasmuch as we think that, on the evidence before the Court, Bahadoor Singh ought not to have been made liable to any extent, it is a necessary consequence that the lower Court is not wrong in the particular matter whereof the present appellant complains. It seems to us, therefore, as we have already said, that this appeal must be dismissed.

It escaped our notice just now for the moment that this appeal, No. 82, does further complain that the plaintiff ought not to have been made to pay Juggur Nath Singh's costs. Juggur Nath himself has appeared in this appeal, and it is plain that there was no sort of evidence affecting him in any way given at the trial. The decision of the lower Court, as far as he is concerned, is quite

impeachable. The matter therefore remains, as we said, that there is no ground of appeal established in No. 82 against any one. That appeal must consequently be dismissed with costs as regards the respondents who have appeared, that is, all the defendants, Ammun Khan, Juggur Nath Singh, and Bahadoor Singh.

The 15th February 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Registration of Plaints—Right of Suit—Action for wages—Limitation.

Case No. 9 of 1873.

*Application for review of judgment passed by the Hon'ble Justices F. B. Kemp and C. Pontifex, on the 12th September 1872, in Regular Appeal No. 70 of 1872.**

J. Young (Plaintiff), Respondent, *Petitioner,*

versus

J. MacCorkindale (Defendant), Appellant, *Opposite Party.*

Mr. J. T. Woodroffe for Petitioner.

No one for the Opposite Party.

A plaintiff was held to be technically right in stating that the fact of his plaint not having been accepted on the day on which it was actually presented, ought not to deprive him of his right of suit.

Wages due to an employé, leaving his employer's service, would be due on the date when he left the service, and any suit for those wages must, in the absence of any subsequent account stated and settled between the parties, be brought within three years from such date.

Pontifex, J.—THIS application for review is made upon the verified statement that the plaint in the suit was really presented on the 29th of July 1871, although the endorsement on the plaint states that it was presented on the 31st July 1871, and it is suggested that this fact might have influenced our judgment, in which we stated therein as follows: "We are of opinion that, at all events, on the 29th July 1868, all partnership-transactions between the parties had ceased, and that a final balance of such matters had been struck * * *; and that as the plaintiff's suit was not instituted until the 31st July 1871, his claim against MacCorkindale was barred." If there had been an account settled and signed between the parties on the 29th July 1868, the applicant would be technically right in stating that the fact of his plaint, not having been accepted on the day on which it was actually presented, ought not to deprive him of his right of suit; though, speaking for myself, I should not be disposed to encourage litigants to put off filing their plaints until the very last day unless they take proper care to have the plaint duly registered on the day on which it is presented. But it is not necessary to dispose of this application for review on that ground. On reference to the printed book, it appears that there was no settled account between the parties on the 29th of July 1868, and the plaintiff does not pretend to say that there was. All he says is that he signed an account on the 29th of July, but he does not admit that account, and he refuses to be bound thereby. In his own examination he says: "I do not consider myself bound by the account I signed." If that account had been binding upon the plaintiff, he would only have been entitled to Rs. 300 per mensem as wages, whereas by his plaint he claims Rs. 500. Irrespective of that, it appears plainly on the evidence that the account of the steam-tug *John Bull*, in which the parties were jointly interested, was settled much more than three years anterior to the 29th of July 1871. It appears on the evidence that the plaintiff left the service of MacCorkindale on the 15th of May 1868; and that the steam-tug, in respect of which there was a partnership between the parties, was sold in December 1866—that is to say, long before the plaintiff left the service of MacCorkindale, and, therefore, previous to the 15th of May 1868. The account of the steam-tug was made up by one Mr. Pittar, and it was stated, settled, and agreed to between the parties before the plaintiff left the service of MacCorkindale, that is, before the 15th of May 1868. In our original judgment it is stated as follows: "After the sale of the *John* "*Bull*, and so far as can be discovered from "the evidence, about the end of 1867, the "account of the *John Bull* was made up by "a Mr. Pittar. * * This statement of account "was submitted to the plaintiff and the defend-"ants MacCorkindale and Watkins, and was "allowed and approved of by each of them, "at all events some time before the 29th of "July 1868." That account showed that, so far from anything coming to the plaintiff, there was a debt due from the plaintiff to MacCorkindale, and we think that, inasmuch as that account was settled considerably more than three years before the 29th of July

* 18 W. R. 466.

1871, the date on which the plaint was presented, the only question between the parties was one of wages. Any wages that might be due by MacCorkindale to the plaintiff would be due to him when he left the service on the 15th of May 1868, and any suit for these wages must, in the absence of any subsequent account stated and settled between the parties, have been brought within three years from the 15th of May 1868.

Therefore, taking it that the plaint was presented, and properly presented, on the 29th of July 1871, we still think that the suit is barred by limitation, We reject the application for review.

The 17th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Zuripeshgee—Mortgage—Possessory Suit—Limitation.

Case No. 446 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 10th October 1871, affirming a decision of the Moonsiff of Durbhangah, dated the 17th June 1871.

Puriag Dutt Roy (Plaintiff), *Appellant,*

versus

Fekoo Roy and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Where plaintiff claims a right to enjoy possession of certain land for a term of years on the footing of a mortgage-transaction (zuripeshgee), it having been a part of his contract with the mortgagor-defendants, that he should repay himself the money advanced by taking the rent reserved on the zuripeshgee lease during its pendency:

HELD that the relation between the parties was different from that of landlord and tenant contemplated in Act VIII. (B.C.) of 1869, s. 27, and that the suit could not be governed by the limitation prescribed in that law.

Phear, J.—IN this case language has been used in both the Courts below which seems to indicate some little confusion as to the mode in which those suits are to be dealt with in the Moonsiff's Court, which are of such a nature as would formerly have rendered them triable only in the Collector's Court. One Court speaks of the suit being a suit which is to be tried on the civil of the Court as distinguished from other side, and the other speaks of its a suit which is to be tried under Act of 1869 (B. C.). There should, we app be no question in the mind of the Co to which side of the Court is to e the suit, or under what Act it is to be It was one of the purposes of the lature when it removed the cognizan certain class of actions from the Colle Court to the Moonsiff's Court, that should no longer be any question in an whether the suitor had invoked the e of the right jurisdiction, and whethe Court was competent to do complete j between the parties. It is the plain of the Court, when a suit is brought b it, to entertain it, and to endeavour to t matter in question between the parties the whole merits. In this instance, no the first material issue raised, and the issue to be tried was, whether or not the is barred by the operation of one or oth the Acts of Limitation. And the findi the Court on that issue would necess depend upon the nature of the c between the parties, namely, upon the tion whether or not the cause of action by the plaintiff is one which falls withi provisions of Act XIV. of 1859, or which falls within the more restricted tation as to time prescribed by section Act VIII. of 1869 (B. C.). The Courts b have both come to the conclusion th suit is barred by the operation of this mentioned section. The words of that tion, so far as they are applicable to the pr case are: " * * * All suits to re "the occupancy of any land, farm, or te "from which a ryot, farmer, or tenan "been illegally ejected by the person "tled to receive rent for the same, * * "be commenced within the period of one "from the date of the occurring of "cause of action, and not afterwards."

Both the lower Courts are of opinion the case of the plaintiff that this is a su recover occupancy of land from which has been illegally ejected by the person is entitled to receive rent for the same.

On referring to the judgment of the Ju we find that he describes the plaintiff's ca of action in this wise: "The plaintiff st that 9 annas and 9 gundas in mou Dhanour Koar were given in ticca to hi by defendants Nos. 2 and 3, at a rental Rs. 100 from 1273 to 1286 F. S., after taki Rs. 1,400 zuripeshgee (Sudhowah Patoo

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is, by the paying back of the amount in ly instalments of Rs. 100. He further s that defendant No. 1 bought one anna e right and title in the share in ticca from ndant No. 2 on 24th Assin 1275 F.S., of h he took possession ousting the plaintiff. plaintiff now sues for recovery of pos- on and mesne-profits for three years."

appears to us that if this rightly states plaintiff's cause of action, and it seems ference to the plaint that it does so, the is not simply a suit to recover occupancy nd from which the plaintiff, as a tenant, een ejected by the person who is entitled ceive rent for the same; for evidently tiff comes into Court claiming a right joy possession of this land for a term of upon the footing of a mortgage trans- n; he seeks to recover the security for ment of the loan which he has advanced, security had been given to him by the dants Nos. 2 and 3, including the defen t- No. 1's vendor, and had been wrongfully from him by the defendant No. 1. In it appears, according to the terms of the t, that, during the pendency of this zur-i- ee lease, no one, other than the plaintiff lf, is entitled to receive any rent, for it part of the plaintiff's contract, as he it, with the defendants Nos. 2 and 3, that ould repay himself the money advanced king the rent reserved on the lease g that time. It is clear to our mind transaction of this kind constitutes a ent relation altogether between the s from that ordinary relation of land- and tenant, which is contemplated under ords used in section 27, Act VIII. of (B.C.). It appears to us, therefore, that Courts below have made a mistake as to eriod of limitation which is applicable s suit. The Lower Appellate Court has ssed the suit, as we think, wrongly, the preliminary issue. The judgment therefore be set aside, and the case sent to the said Lower Appellate Court for upon its merits. But, if it appear to us e our decree is drawn up that the first t took no evidence, but simply decided the preliminary issue, the order will be the Lower Appellate Court must send the back to the first Court for trial upon the s.

ts must abide the event.

The 18th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Execution—Attached Property—Valuation.

Case No. 272 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Hooghly, dated the 31st May 1872, affirming an order passed by the Second Subordinate Judge of that District, dated the 16th January 1872

Jogendro Nath Mullick and others (Judgment-debtors), *Appellants*,

versus

Rajah Bijoy Keshul Roy (Decree-holder), *Respondent*.

Mr. Evans and *Baboos Gopal Lall Mitter* and *Grish Chunder Ghose* for Appellants.

Mr. R. T. Allan and *Baboos Ashootosh Dhur, Nil Madhub Sen*, and *Bacharam Mookerjee* for Respondent.

Where it was ordered in execution that a decree-holder should get possession of a specified plot (No. 2) out of three into which certain property had been divided for purposes of valuation, and after a portion of such plot had been taken possession by him, there still remained something due on the decree:

HELD that, so long as any portion of plot No. 2 remained, the decree holder could not touch the remaining plots.

Glover, J.—THE respondent got a decree for a one-third share of certain immoveable property, the money-value of which share was found to be Rs. 6,626. For the purposes of this valuation, the land and houses comprising the property had been divided into three plots, and in execution it was ordered by the Principal Sudder Ameen (30th March 1867), that the decree-holder should get possession of plot No. 2, and that, if that did not satisfy the decree, other property in plots Nos. 1 and 3 should be added.

Plot No. 1 consists of the dwelling-house of the debtor's family.

Plot No. 2, of a cutcherry and boituckhana, with land on the north, east, and west sides.

Plot No. 3, of cultivated and other lands.

The cutcherry and boituckhana, called in this record "Anundoram," were taken possession of by the decree-holder, but there still

remained due to him Rupees 1,006-12, which he had been declared both by the Subordinate Judge and Judge to have the right to take in the shape of a part of the dwelling-house of the debtor in plot No. 1.

It has been admitted by the respondent's pleaders before us that there is still a portion of land appertaining to plot No. 2 of which the decree-holder has not taken possession; and the map filed with this record shows that the buildings only, *viz.*, the cutcherry and boituckhana house, have been taken, leaving a considerable quantity of what is called in the map garden-ground still unappropriated.

Now, the order of the 30th of March 1867, which admittedly governs these proceedings, gave the decree-holder first lot No. 2, and if that did not satisfy his claim, then other properties named. The appellant contends that the valuation of plot No. 2, including both houses and land, would fully represent the decree-holder's one-third share, and that this plot ought to be exhausted before giving the creditor any part of the family dwelling-house (plot No. 1).

It was stated also before us, and not denied by the respondent, that the balance of Rs. 1,006-12 had been many times offered to the decree-holder, but had been refused by him.

We think that this appeal is virtually disposed of by the respondent's admission that there is still land appertaining to plot No. 2 which has not been appropriated to the satisfaction of his decree. The Subordinate Judge's order of 1867 expressly directed all the plot No 2 to be first taken, and so long as any portion of that plot remains, the debtor's dwelling-house, plot No. 1, cannot be touched.

There will be no necessity for any re-valuation of the shares, because there was no appeal to the Judge on this point, and Rs. 1,006-12 was taken by both parties as representing the sum due to the creditor after he had received the cutcherry and boituckhana houses, the stables and one or two other small plots appertaining to the estate. The question to be decided is whether the garden-land to the north, east, and west of the Anundoram is of the value of Rs. 1,006-12. If it is, the decree-holder must take his balance from it; if it exceeds the sum due, he will take proportionably. If it falls short, he can then have such portion of the dwelling-house, plot No. 1, as is sufficient to make up the amount.

There was some contention, although the point was not pressed before us, that, in the event of plot No. 2 not being sufficient, the balance should be taken from plot No 3; but this would be contrary to the Principal Sudder Ameen's order, which directs that should plot No. 2 prove insufficient, a specified part of the dwelling house buildings is to be given to the decree-holder, to the extent of count of the balance still due.

We make no order as to costs.

The 18th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Evidence—Title-deeds—Rent-receipts—Presumptions.

Case No. 125 of 1872.

Regular Appeal from a decision passed by the Judge of Gya, dated the 22nd February 1872.

Khoda Buksh Khan (Petitioner), *Appellant*

versus

Mussamut Choa (Opposite Party), *Respondent*

Mr. C. Gregory for Appellant.

No one for Respondent.

In a case involving the alternative question of fact whether certain land belonged to R or to C, neither the one nor the other of the opposite party venturing to state who his opponent was, and the testimony of the witnesses on this point being doubtful:

HELD that R, who was in possession of the title deeds and of the receipts of rent, ought to succeed unless there was something on the record to countervail such strong evidence.

Phear, J.—THE question in this case is a very simple alternative question of fact, viz., whether certain land, taken by the Government, belongs to one Khoda Buksh, or to one Mussamut Choa.

Unfortunately the evidence which has been taken at the hearing below is very unsatisfactory and incomplete. The examination of the witnesses appears to have been conducted in such a way as to leave it in the highest degree uncertain what facts each witness can actually depose to of his own personal observation. And then the principal parties themselves have not been examined, although there seems to be no reason at all why, in a case like this, they should not have been brought, so to speak, face to face, and cross-examined in reference to each other's testimony. It appears that neither the one nor the other of the opposite party ventures to state who his opponent is

d the testimony of the witnesses on this nt is entirely in doubt. However, it is ain that Khoda Buksh is in possession of title-deeds of the land in question, and of receipts given by the superior holder for t paid in respect of it. This is, so far it goes, strong evidence in his favor; d it appears to us that he ought to succed upon it unless there is something to be nd upon the record to countervail it on other side.

But after the best consideration which we give to the evidence such as it is, it ms to us that there is nothing of the llest value on the other side. On the contry, there is something afforded by Mussmut Choa and her witnesses which is orable to Khoda Buksh's claim. For it to be observed that when the Mussamut d her petition in September 1871, she ed therein: "It is rumoured that an nexisting person, by name Khoda Buksh, leging himself to be the son of Shumhere Khan, has applied for getting from overnment the value of the juglis land tained in settlement by Shumshere Khan, ut there is no person (by name) Khoda uksh, and your petitioner, mother of humshere Khan, is in possession of the uglis land."

After this date, namely, in November, the tioner Khoda Buksh filed his title-deeds receipts of rent for 1278, 1275, and 1274. December, the Mussamut supported her tion by a written statement. And, of rse, by that time she had had the opportity of knowing what were the documents ch Khoda Buksh had filed, and it is a nificant fact that in this written statement states that, "inasmuch as she could not rsonally look after and effect the mangement of the land in question, she had ppointed Khoda Buksh as manager, and cordingly the amuldustuk granted by overnment and the receipts granted by the oprietor passed into his hands."

So we have it now that she has changed line of defence totally. While she at said that there was no such person at as Khoda Buksh, afterwards when she covered that the petitioner Khoda Buksh supporting his case by the production he amuldustuk and receipts, she makes statement that we have just read, in order account for his possession of them.

Again the statement that she could not perally look after and effect the management he property on account of her age seems rather absurd when we look at the amuldustuk, and find that the whole extent of the jageer is 21 beeghas and 14 cottahs. Old as the lady was, surely there would not be any difficulty in receiving rents payable by the ryots in occupation of this small plot of land, without keeping a manager who appears himself to have been for some time past in the police service at a distant place.

Then three of her witnesses say that the ryots in occupation of this land pay their rents to Mussamut Choa. But none of these ryots have been produced. There is not a single person who says that he cultivates the land under Choa, and pays rent to her or to anybody as her representative. The evidence of Sooamber Singh, upon which the Judge to some extent relies, really amounts to nothing more than this, that he collects for Mr. Solano the rent of this jageer land, and has received it on four occasions from Khoda Buksh. But he believes that the land formerly belonged to Choa's husband, and that Choa is the mother of Shumshere.

It seems to us that in this there really is nothing of weight put against possession of the title-deeds and of the receipts for rent.

Unsatisfactory as the case undoubtedly is, we must say that we think the Judge was wrong in giving his award in favor of Choa, because it seems to us that the evidence, so far as it tends at all either way, is exclusively in favor of Khoda Buksh. We must, therefore, reverse the order of the Judge, and declare that the appellant is entitled to the share of the compensation-money claimed by him.

The appellant is entitled to his costs in this Court as well as in the lower Court.

The 18th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Foreclosure—Lunatics—Hindoo Law—Guardian and Manager—Power of Manager—Act XXXV. of 1858

Case No. 169 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 5th May 1871.

The Court of Wards, on behalf of Kasho Pershad Singh, a lunatic (Defendant), *Appellant*,

versus

Kupulmun Singh and another (Plaintiffs), *Respondents*.

Mr. J. T. Woodroffe and *Baboo Annoda Pershad Banerjee* for Appellant.

Baboos Mohesh Chunder Chowdhry, *Romesh Chunder Mitter*, and *Aubinash Chunder Banerjee* for Respondents.

K and R sued the Court of Wards as guardian of one P, an idiot, to foreclose a mortgage, and obtain possession, that claim being based upon a deed of *bye-bil-wufa* executed by L the idiot's mother and guardian, to provide means to meet an ancestral debt. The Sub-Judge gave plaintiff a decree, holding that the lunatic as such had no *locus standi*; that his mother was sole heir; and that, though she executed the deed as if on behalf of her son, yet it was not vitiated on that account, because it was executed in her proprietary, and not her fiduciary character:

HELD that, if the lunatic was not the owner, the suit was worthless for the purpose of foreclosing the equity of redemption of the real owner, who was no party to the suit:

HELD that, as no issue was raised in the first Court, or suggested by either party as to the lunatic's proprietary right, the Lower Appellate Court did wrong in raising for the first time an issue of this kind:

HELD, that a Hindoo lunatic may have property even though he is not capable of inheriting while a lunatic, but he cannot make valid contracts binding either on himself or on his property. All dealings with his property must be made by the hands of a guardian or manager to be appointed by the supreme civil power, the legality of the guardianship depending on such appointment.

A Court, when representing such authority, is bound to appoint the fittest and most proper person from among relatives, the father being legal guardian, and in default the mother, and so on.

After the passing of Act XXXV. of 1858, an appointment of a guardian or manager of a lunatic's estate could not be properly effected otherwise than as there prescribed; and no *de facto* manager could have more power of aliening and encumbering than a *de jure* manager would have.

Phear, J.—IN this suit, Kupulmun Singh and Ramdut Singh, co-plaintiffs, sue the Court of Wards as guardian of one Kasho Pershad Singh, an idiot, to foreclose a certain mortgage, and to obtain possession of the mortgaged premises.

The plaint alleges that, after the death of the idiot's father at some unmentioned date, Mussumat Luckhee Kooer, the mother and guardian of the idiot, was appointed manager and administrator of his estate; that the father, in his lifetime, had borrowed money, and that the loan effected by him at usurious interest had swelled up to a very large sum, and the estate of the idiot, in execution of a decree of Court for ancestral debt, was advertised for sale; that, inasmuch as t complicated and heavy debt at a usuri rate of interest rendered its liquidati fraught with difficulty and danger of t loss of the whole property, the Mussumat, w the view to preserve the ancestral estate the idiot, through an agent, formally e cuted, in February 1860, a deed of *bye-wufa*, upon which the plaintiff's claim based, for a consideration of Rupees 16, at a monthly interest of 7 annas 9 pie, a fraction, per cent., stipulating that whole consideration should be repaid at end of Jeit 1276.

The plaint further alleges that the co deration-money was duly applied to relief of the estate, and that the plain regularly realized all the interest thereon to the end of Jeit 1276 by the receipt rent from certain lessees of the estate. that the Mussamut, notwithstanding plaintiffs' importunities, refused to pay mortgage money at the stipulated per *viz.*, the end of Jeit 1276; that the plaint therefore, filed an application to the Jud Court for foreclosure, and got the no formally issued and duly served upon mother of the idiot. The plaint then all that the property of the idiot has been pla by an order of the Judge under the man ment of the Court of Wards, but never less the money has not been deposited; inasmuch as the period of time prescr by the law has elapsed, the plaintiffs b this suit for foreclosure.

The written statement filed by the C of Wards as guardian of the idiot K Pershad says, that Mussamut Luckhee K never was the *bonâ-fide* guardian of idiot, never had authority in law to exe the *bye-bil-wufa* on which the plaintiffs that she had in fact applied to the Cour a certificate of guardianship, and her a cation was rejected on the 8th Febr 1860, just before she executed the dee *bye-bil-wufa*. The Court of Wards, in same written statement, further denied at the time of the execution of the d there was any such legal and ancestral as would be sufficient in law to support deed; and also denied that the considera money for the *bye-bil-wufa* was applie the plaint alleged. Further, the Cou Wards alleged that the plaintiffs proc the execution of the *bye-bil-wufa* by exercise of undue influence, fraud, and c sion, and that the value of the pro pledged was greatly more than the all consideration for the mortgage.

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Upon these statements on the one side and on the other three issues were raised, namely :—

"*First.* — Whether Mussamut Luckhee Kooer, mother of Kasho Pershad (the lunatic), was, on the date of the admitted deed of *bye-bil-wufa*, the guardian of the said lunatic under Hindoo Law and Government enactment, and as such, legally authorized to contract a loan, and mortgage the lunatic's property in order to liquidate ancestral debts of the lunatic, and to save the estate from ruin.

"*Second.* — Whether the said guardian, Mussamut Luckhee Kooer, did actually liquidate the ancestral debt of Kasho Pershad (the lunatic) with the Rupees 6,000 contracted on this deed of suit or not, *i. e.*, whether her action in contracting the loan, and executing the said deed, was for legal necessity, and justifiable or not.

"*Third.*—Whether the defendant's alleged difference in the amount of the loan contracted, and the amount of the value of the property mortgaged, would make any difference in the nature of this case."

The case has been fully tried, and the Subordinate Judge has given a decree in favor of the plaintiff. His judgment is certainly in some respects remarkable. He says: "It is an admitted fact that the defendant is a lunatic; he is not therefore legal heir of his father, but his mother is the sole heir of Chowdhry Kishen Dyal Singh, deceased. * * * It is patent the lunatic has no *locus standi*, and that his guardian and proxy, as a matter of law, cannot raise any objection as to the legality and validity of the transaction. It is manifest from the above that the lunatic is not the heir of his late father, and that his mother is the heir under the *Shastras*."

The Subordinate Judge then argues that, though the Mussamut did in fact execute a deed as if on behalf of her son, yet "the contract was made in her proprietary, and not her fiduciary, character, and, therefore, the contract was not vitiated on that account."

The lower Court says, that its findings on this head "are sufficient for the disposal of the case," and accordingly it gives a decree to the plaintiffs for possession of the mortgaged premises, together with costs.

It thus appears to have altogether escaped the notice of the Judge that the suit was brought against the idiot alone as represented by the Court of Wards, and that the Mussamut, his mother, was no party to the suit in any way. If, therefore, the Court's finding that the property did not belong to the lunatic be correct, still the plaintiff, in order to succeed, must make out his own title to possession; and that he cannot do, on the facts which he himself puts forward, without showing something more than the mortgage made to him of the property by the real owner. He must, in addition, show that the real owner's equity of redemption has been foreclosed, so that the full title to the property and to possession of it has passed to him. But obviously he cannot do this, because *no* suit for the purpose of foreclosing the equity of redemption has been brought against the owner excepting this suit; and if the lunatic be not the owner of the estate, this suit is worthless for the purpose of foreclosing the real owner's equity of redemption, and consequently that equity is still outstanding.

It would seem clear, therefore, that on the finding which the lower Court has come to, it ought to have dismissed the suit with costs.

But further than this, it is beyond question of the essence of the plaintiff's suit that the property belongs to the lunatic; and we need not say that, according to Hindoo law, a lunatic may possess property. No issue was raised in the first Court or suggested by either party for any purpose connected with the suit relative to the lunatic's proprietary right. The Subordinate Judge was, therefore, quite wrong in raising himself for the first time in his judgment an issue of fact of this kind, and then determining it upon the evidence before him, notwithstanding that the parties did not themselves desire it, and had not had an opportunity of bringing any evidence to bear upon the point. It might well enough be in this case, and would accord with all the facts that are stated or proved, that Kasho Pershad became insane after he had succeeded to his father's property. As the case stands, we must certainly take it that the property which was mortgaged by the Mussamut to the plaintiffs was, at the time of the mortgaged transaction, the property of her son Kasho Pershad, and that he was then an idiot or lunatic. It therefore becomes necessary to inquire what was the state of the law at the period when the mortgage was effected, so far as it bore upon the matter of the alienation of the lunatic's property.

Now, we apprehend it is quite clear, as we have already said, that a Hindoo, being a lunatic, may, nevertheless, have property, even though he is not capable of taking property by inheritance in the event of his being lunatic at the time when the inheritance opens to him. But if a lunatic has property, it is then, we think, quite certain that by

Hindoo law he cannot himself make valid contracts binding either on himself or on his property. If it is necessary to refer to authority for this purpose, it may be found in Menu, both as given in Sir William Jones's edition and in the text given in Colebrooke's Digest. The text 11 in the second Bock, Chapter II., section 1, of Colebrooke's Digest, headed Menu, runs thus: "A contract "made by a person intoxicated or insane, "or grievously disordered, or wholly depen- "dent, by an infant or decrepit old man, or by "a person without authority, is utterly null."

Again, the following text of Yajnyawalcya: "A contract made by a person "intoxicated or insane, or grievously dis- "ordered, or disabled, by an infant, or a man "agitated by fear or the like, or *in the name* "*of another* by a person without authority, "is utterly null."

Therefore all dealings with the property of one who is insane, if dealings can be effected so as to be valid and binding upon it (and obviously such property needs to be managed as much as any other), must be made by the hands of a guardian or a manager; and the Hindoo law, as we understand it, recognized this necessity quite as early as it laid down the disqualifications which we have referred to; and we think it is undoubted that (to adopt the generalization of Sir Thomas Strange) the supreme civil power is the authority to appoint an efficient manager and guardian of a disqualified person's property.

In 1st section, Chapter III., 4th clause, Sir Thomas Strange says: "With respect to the "relation of *guardian* and *ward*, the king, as "he is, by the Hindoo law, failing all others, "the ultimate heir of all, Brahmins excepted, "so is he to an extent beyond what is recog- "nized by us in our Court of Chancery the "universal superintendent of those who can- "not take care of themselves. In this capacity "it rests with him, *i. e.*, with the Judicial "Power, exercising for him this branch of "his prerogative, to select for the office the "fittest among the infant's relations; prefer- "ring always the paternal male kindred to a "maternal ancestor or female."

For this position Sir Thomas Strange refers to Menu, Chapter VIII., sloke 27, and also to some texts in Colebrooke's Digest.

Slokes 27 and 28 of Menu's 8th Chapter run thus:—

"27. The property of a student and of "an infant, whether by descent or otherwise, "let the king hold in his custody, until the "owner shall have ended his studentship, or "until his infancy shall have ceased *in the* "*sixteenth year*."

"28. Equal care must be taken of barren "women, of women without sons, *who* "*husbands have married other wives*, of "women without kindred, or whose husbands "are in different places of widows true to "their lords, and of women afflicted with "illness."

And the propriety of giving an extension of Menu's words, such as to make them applicable in regard to all persons incapable of taking care of themselves, as Sir Thomas Strange has given it, has been recognized many times in this Court. We will only now refer to a case which was quoted by both sides in argument before us, namely the case reported in 7 Weekly Reporter, page 6.

No doubt the Court, when representing the supreme authority in appointing a guardian, is bound to choose the fittest and most proper person from among the disqualified person's relations, who can be found for the purpose, and in this sense it has been recognized that the father is the *legal guardian* of his minor children; in default of the father, the mother, and so on.

The technical term thus arising, *legal guardian* was used in argument before us and insisted upon with some force for the purpose, as we understand the learned Counsel, of leading the Court to the conclusion that the mother, in this particular case, was by Hindoo law the guardian *de jure* in the sense which the Privy Council seem to have given to that phrase in the now celebrated case of Hunooman Pershad. But it seems to us that, according to the true principles of Hindoo law, the legality of the guardianship ultimately depends upon the appointment to the office of guardian by the supreme civil authority as represented by the Court.

The guardian, when thus duly appointed, no doubt, has certain powers of dealing with the disqualified person's estate, and of making contracts with respect to it, which shall be as binding as if they had been made by the owner himself. And it may, we suppose, be taken as a general rule of equity that any one dealing *bonâ fide* for valuable consideration with one who is *de facto* guardian within the limits of the powers which such a guardian, acting *de jure*, would have in respect of the ward's property will be relieved from the necessity of inquiring whether the *de facto* guardian is also *de jure* guardian, that is, whether he was originally duly appointed or not.

Up to the year 1858, no special rules or actments, as far as we are aware, existed to vern the action of the Courts in the mat- of appointing a guardian or manager for lunatic generally. We have on this point m referred to the Regulation passed in 1793, d to two or three other Regulations passed bsequently. But we think it is admitted both sides that there was no Act which s ge erally applicable to all cases of luna- s until the date of the passing of the Act XXV. of 1858. Now, by that Act, a par- lar course is marked out for the Court to sue in regard to appointing a guardian or anager of the lunatic's estate; and we prehend that, after the date of the passing his Act, an appointment of a guardian or nager of a lunatic's estate could not be perly effected in any other manner than the special manner prescribed by that . Possibly, though as to this we desire xpress no judicial opinion, even since the ing of that Act, third parties may, under e circumstances, be held to have dealt, *fide* with a manager acting *de facto* duly appointed. and on that ground be ved under the general principles of ity to which we have referred from the ssity of inquiring whether or not the *facto* manager is also *de jure* manager, vided always the dealing in question falls in the area for which a *de jure* manager ndoubtedly powers to deal in respect is ward's property. But in the present it is all important to bear in mind that Act of 1858 not only prescribed a icular proceeding as the method to be wed in appointing a manager, but also ed the powers of the manager when so inted, in regard to the aliening and mbering of his ward's property. And ems to us that whatever may be the limit of the application which ought e made of the above referred to equit- principle in favor of a *bond-fide* pur- er for valuable consideration since the ing of this Act, at any rate no such ication can be made as would have the t of giving a *de facto* manager not being anager *de jure*, a greater power of ing and incumbering than a *de jure* ager would have, for such an applica- of the principle would have the effect of ing the enactment of 1858 to a nullity. e now come to the critical point in this . The plaintiff, although he says in the that the Mussamut was appointed ager, has not attempted for one moment prove any *factum* of appointment; and we suppose that he simply relied upon the equitable presumption being made in his favor for the support of his allegation. Not only, however, has he not proved it, but we believe it is admitted by the plaintiff's advisers that the statement made on behalf of the lunatic is true, namely, that the widow never was appointed; and that, although she did, in fact, make an application to the Court for appointment, her application was refused. So that it is abundantly clear that the person from whom the plaintiffs say they obtained their title was not duly appointed as by law was necessary in order to give her *de jure* power to deal with the lunatic's estate; and it is also further apparent (and indeed the plaintiffs do not allege it) that the person from whom the plaintiffs pretend to have got their mortgage did not give it to them under the sanction of the Court, without which sanction, no good title could be passed by the manager under the Act of 1858. The case of the plaintiffs is simply that there was necessity, and that, in the event of necessity, the manager has the requisite power. We think this position is not tenable now. We think it would be almost absurd to hold that a manager acting without proper authority is in this respect more free and more favorably situated than is a manager duly appointed.

It seems to us, in short, that the plaintiffs fail entirely to make out their title, because they are unable to show that the provisions of section 14, Act XXXV. of 1858, were complied with in their case. The words of that section are: "Every manager of "the estate of a lunatic appointed as afore- "said may exercise the same powers in "the management of the estate as might "have been exercised by the proprietor, if "not a lunatic; and may collect and pay all "just claims, debts, and liabilities due to or "by the estate of the lunatic. But no such "manager shall have power to sell or "mortgage the estate or any part thereof, or "to grant a lease of any immoveable pro- "perty for any period exceeding five years, "without an order of the Civil Court pre- "viously obtained."

No such order of the Civil Court empowering the Mussamut to mortgage the lunatic's property, or to otherwise alien it, was obtained or attempted to be obtained. We think, therefore, that the plaintiffs have got no title under the alleged deed of *bye-bil-wufa* against the estate of the lunatic who is represented in this suit by the Court of Wards.

It follows then, upon this ground alone, that the suit must be dismissed.

We wish to add that, upon the evidence which has been minutely analyzed before us by both parties, we are by no means satisfied that there was a debt, or were debts, so pressing upon the estate as would constitute a legal necessity for mortgaging it upon the ground put forward by the plaintiff; and, indeed, less sufficient evidence of payment of the alleged debts than that which is in the record we have seldom seen. It may be well enough for anything that the witnesses deposed to, that several of the bonds which the plaintiff maintains have been paid off with his money are still outstanding and may yet be put in force at some subsequent period. We really know nothing whatever upon this point. The original bonds have not been produced—have not been accounted for. And so far as there was anything proved by the plaintiff in the shape of a charge or inchoate charge upon the estate, we may say that in not one instance had it ripened into actual pressure. The mortgage of the whole estate which the plaintiffs alleged that they obtained seems to us to have been at least as great and exhaustive a burden as that which it pretends to replace. In fact, if they had established their case, it would have shortly come to this, namely, that they really swallowed up the whole of the lunatic's property in the place of those creditors whom they say they had paid off. Of course, this result is not itself sufficient ground whereon to dispose of the plaintiff's case, but it seems to afford strong reason for scrutinizing very closely the whole mortgage-proceedings, and for insisting upon strict proof of the plaintiff's material allegations.

It is unnecessary, however, that we should say anything further upon the merits of the plaintiff's claim. We confine ourselves simply to dismissing the suit with costs.

The 18th February 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Rent—Suit by Co-sharer—Findings by Revenue Officers—Act VI. (B. C.) of 1862, s. 10.

Case No. 119 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 12th October 1871, affirming a decision of the Deputy Collector of Meherpore, dated the 16th March 1870.

Dinobundhoo Chowdhry (Defendant), *Appellant,*

versus

Dinonath Mookerjee (Plaintiff), *Respondent.*

Mr. C. Jackson and *Baboo Grish Chunder Mookerjee* for Appellant.

Baboo Doorgadoss Dutt for Respondent.

An undivided co-sharer cannot maintain a suit for arrears of rent against an occupant of the estate without evidence that the rents due to such co-sharer have been separately collected, or that there was an agreement to pay them separately. Still less can such a suit be maintained where the defendant is himself a co-sharer.

Per Jackson, J.—The High Court will not hold a person bound by the finding specified in Act VI. (B.C.) of 1862, s. 10, unless it is shown beyond a doubt that the proceedings of the revenue officers referred to have been conducted in strict accordance with the terms of that section.

Jackson, J.—Of the objections taken to the decision of the Lower Appellate Court in this case, the first appears to be sufficient for the decision of this special appeal, viz. that this suit for arrears of rent has been brought against the defendant as occupant of some land within an estate by a party whose interest is that of an undivided co-sharer, there being no evidence to show that the rents due to such co-sharer have been separately collected, or that there was an agreement to pay them separately. On this point we entirely adhere to what has been said in the cases cited in 15 Weekly Reporter, pages 243 and 396. In this case we have the additional complication that the defendant who is sued for arrears of rent is not himself an ordinary ryot, but is one of the co-sharers in the same estate; and it may be well doubted whether between him and the plaintiff there can be said to be any relationship of landlord and tenant. On this ground alone we think the plaintiff's suit ought to be thrown out; but there is one more observation which we wish to make before disposing of this case, and that is that it has been sought to bind the defendant by the result of the proceedings taken for measurement under the 10th section of the Bengal Council Act VI. of 1862, and the Judge has held the defendant to be so bound in these words: "To all this, grave as the objection "may be, there is but one answer that the "Court can give. The object of section 10 "was to enable landlords to collect their "rents when they were defeated in the

attempt to do so by inability to ascertain the existing incumbrances on the land in any other way; that it was unquestionably intended that the findings of the Revenue Authorities should be binding on the tenants unless they came forward and honestly and helpfully showed their own claims. The section is no doubt a very serious one, and may be abused to a terrible extent. But if a tenant, seeing a Government Ameen come at the plaintiff's instance, will not take the trouble to inform himself of the Ameen's powers and object, he cannot be said not to be a proper subject for strict treatment." How much of these servations are applicable to the case of co-sharer in a zemindaree who occupies land cluded in the estate, we need not stop to quire. This we think we need only say at severe and, as we have more than once served, mischievous as the provisions of at section appear to us to be, I, for myself, ill not hold any person bound by the result the findings therein specified, unless it is own beyond a doubt that the proceedings the Revenue Officers referred to have been nducted in strict accordance with the terms that section. It seems to us very doubtl that in this case that can be said. We ink the decisions of the Lower Appellate urt and the Court below cannot be suprted, and that this special appeal must be owed with costs.

The 19th February 1873.

Present:

e Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

le under Act XIV. (B. C.) of 1865—Incumbrances—Shikmee and Jummai Tenures.

Case No. 702 of 1872.

ecial Appeal from a decision passed by the Judge of West Burdwan, dated the 29th January 1872, reversing a decision of the Moonsiff of Bishenpore, dated the 28th April 1871.

Huree Narain Chatterjee (Plaintiff), *Appellant*,

versus

Wooma Churn Mookerjee (one of the Defendants), *Respondent*.

Babóo Nil Madhub Sen for Appellant.

Baboos Mohesh Chunder Chowdhry and *Grish Chunder Mookerjee* for Respondent.

Where a shikmee tenure was sold under Act XIV. (B. C.) of 1865, and the shikmeedar was found to be the under-tenant of the zemindar, the shikmee pottah not giving the privilege of making incumbrances, the purchaser was HELD entitled under s. 16 to receive the tenure free of all incumbrances, *e.g.*, the incumbrances of a jummai tenure of a person who was not a khoodkast ryot.

Glover, J.—THE Judge having found as a fact that the rent-decree and consequent sale were not fraudulently obtained, the only question to be determined in this special appeal is whether the defendant, purchaser of Kumul Roy's "shikmee" tenure, is entitled to receive his purchase free of the incumbrance of Koshal Roy's "jummai" tenure.

It is admitted that Koshal Roy held his tenure from and under the "shikmeedar" Kumul Roy; and if Kumul was an "under-tenant" of the zemindar, all incumbrances made by him without the special consent of his lessor, and not made *bonâ fide* in favor of certain descriptions of ryots, would be avoided by a sale of the tenure under Act XIV. (B.C.) of 1865.

We agree with the Judge in thinking that the shikmeedar in this suit was the under-tenant of the zemindar. The latter was responsible to Government for the rent of the holding, and his whole estate would have been brought to sale in the event of default. He was the only person who could sue the shikmeedar for rent; the land held under the shikmee was part of his estate, and he might have held it himself had he chosen to have taken the settlement, and received a percentage of the collections as malikana.

It is not contended that the "shikmee" pottah gave the privilege of making incumbrances, nor does the plaintiff assert that Koshal Roy was a khoodkast ryot. The words "resident and hereditary cultivators" used in the section apply, we consider, to a personal right vested in such ryots, and not to a purchaser of the ryot's holding at an auction-sale.

Under these circumstances, the purchaser of the shikmee under-tenure would, by section 16 of the Act, be entitled to receive that tenure free of all incumbrances, "which may have accrued thereon by any act of the holder of the under-tenure," Kumul Roy, and is not therefore bound to respect the "jummai" right of Koshal Roy, whose interests have been bought by the special appellant.

The appeal must be dismissed with costs.

The 19th February 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Notice of Foreclosure—Proof of Service—Transferees.

Case No. 227 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 21st August 1871, modifying a decision of the Officiating Moonsiff of Goash, dated the 31st December 1870.

Tazun Bibee and others (some of the Defendants), *Appellants,*

versus

Shib Chunder Dhur (Plaintiff), Respondent.

Baboo Hem Chunder Banerjee for Appellants.

Baboo Taruck Nath Sen for Respondent.

Where defendant denied having received notice of foreclosure, and the witnesses called to prove service denied all knowledge of the matter, HELD that the report of the peon in the formal proceedings before another Court was inadmissible as evidence in the case, and the acquiescence of one mortgagor was not binding on the other.

Transferees in possession are entitled to have notice of foreclosure.

Jackson, J.—THE decision of the Lower Appellate Court is manifestly erroneous. It is clear that there is no evidence to show the service of notice of foreclosure upon the mortgagors. The persons entitled to the notice were two, one Mozuhur, and the other Tazun Bibee. Mozuhur, it seems, did not defend the suit, but Tazun Bibee denied that she had been served. The witnesses who were called to prove the service denied all knowledge of the matter, and there was nothing else before the Court except the report of the peon in the formal proceedings before the Zilla Judge. The Judge ought not to have treated it as evidence in this case, nor was the acquiescence of Mozuhur Ali at all binding on the other mortgagor (Tazun Bibee). This being so, there could be no decree.

There was a further point in the case that some other parties came in and alleged that the mortgagors had transferred their interest to those parties, and that the transferees were in possession, and it is contended on authorities on this point that the transferees in possession were entitled to have notice of the foreclosure. The decisions no doubt are to this effect, and as the plaintiff will have to commence over again, he no doubt will find it to his advantage to give notice to those parties as well as to the original mortgagors.

The decision of the Lower Appellate Court is, therefore, reversed, and the suit stands dismissed with costs on failure of service of the notice of foreclosure.

The 21st February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

Regulation V. of 1812, s. 3—Appeals.

Case No. 36 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 16th November 1872.

Gooroo Doss Roy (Opposite Party), *Appellant,*

versus

The Collector of Furreedpore and another (Petitioners), *Respondents.*

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Appellant.

No one for Respondents.

A precept having been issued by the Judge to the Collector under Regulation V. of 1812, s. 3, directing him to hold certain land in attachment, an appeal was preferred to the High Court. The Court permitted the appeal to be filed, with liberty to the respondent to contend that no appeal lies.

Note by the Deputy Registrar.—An application was presented to the Judge of Dacca to exercise the power of attachment provided by section 26, Regulation V. of 1812.

The Judge, on the 16th November 1872, *on sufficient cause having been shown,* as is expressly stated by him in his order, issued the precept to the Collector prescribed by section 3, Regulation V. of 1827, which modifies to that extent the Regulation of 1812.

This appeal is preferred against that order.

The above Regulations are still in force; and the construction of the late Sudder Court, No. 717 of the 21st September 1844, with reference thereto, has not, as far as I am aware, been repealed or modified.

According to that construction, the order the Judge, *as to the sufficiency of the se shown*, is open to appeal.

Regulation V. of 1812 makes such an der appealable to the Provincial Court of peal. On the abolition of the Provincial urt, the Sudder Court took its place; and section 15 of the Letters Patent, the gh Court is authorised to "exercise apllate jurisdiction in such cases as were bject to appeal to the Sudder Dewanny awlut, by virtue of any Laws or Regulans now in force."

As Regulation V. of 1827 limits the on of the Zillah Judge to the issue of a cept to the Collector, "directing him to d the land in attachment," &c., instead himself proceeding (as he was empowered der the previous Regulation to do) to ch the land, &c., his order, it is presumed, ppealable to this Court.

But as this is the first appeal of the kind t has been filed in the High Court, I beg efer it for orders as to its admission or erwise.

That such appeals were allowed by the Sudder Court appears from the cases rted in Carrau's Reports of Summary ses, p. 7; and pp. 22 and 123, Court's Rets of Summary Cases, Volume I., Part 2.

ORDER.

Couch, C.J.—Let the appeal be filed, respondent being at liberty to contend t no appeal lies.

The 22nd January 1873.

Present:

James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation—Adverse Possession—Declaratory Decree—Act VIII. of 1859, s. 15.

Appeal from the High Court of Judicature at Fort William in Bengal.

Sadut Ali Khan

versus

Khajeh Abdool Gunnee;*

and

Khajeh Abdool Gunnee

versus

Hussamut Zamoorudoonnessa Khanum.†

A sharer (K) in a zemindary, having been unsuccessful in proceeding against the holder of a sub-tenure to enhance its rent, and doubt having been thrown on his zemindary title, brought a suit to establish his right of enhancement. The holders of the tenure contended that, even if the zemindary right had passed to him by purchase, he had never received rents, and his claim was barred by limitation. And with reference to a compromise, under which, at the close of a former litigation, a certain sum had been paid to (K) as mesne-profits, it was argued that the last item of the rent of the sub-tenure, entering into that sum, must have accrued more than 12 years previously:

HELD that the payment of the sum within the 12 years was evidence of a recognition of title sufficient to exclude the notion of an adverse possession for more than 12 years:

HELD that the High Court had exercised a sound discretion in entertaining a suit for a declaratory decree where a zemindar, who, in a suit for enhancement, had had his zemindary right denied, came into Court to have that right ascertained and declared:

HELD (with reference to s. 15, Code of Civil Procedure) that, where a declaratory decree is sought without consequential relief in the same suit, the Court must see that the declaration of right may be the foundation of relief somewhere, and that that condition was sufficiently met in the present case.

IN delivering judgment upon these appeals, their Lordships think it necessary, in the first place, briefly to review the history of this litigation.

Fyz Ali Khan, a Mahommedan zemindar in the District of Mymensingh, died on the 16th of December 1824, leaving two widows and a son. The son is the appellant in the first, and the husband of the respondent in the second appeal.

The widows were Shumsoonnessa and Reazoon, who was the mother of the appellant Sadut Ali Khan. Fyz Ali Khan, upon the occasion of his marriage with Shumsoonnessa Begum, had contracted to give her a certain dower, of which one-third was to be prompt; and it appears to have been agreed on the same occasion, that he should, in satisfaction of that portion of the dower which was prompt, make over to her, as he accordingly did make over by a kabinnama, 22 villages forming part of his zemindary. A partition was then in the course of being made between him and his co-sharers in the larger zemindary of which that property, which, for the purposes of this suit, may be called his zemindary, was part; on that partition three of the villages comprised in the kabinnama fell to the lot of one of his co-sharers; and, it is contended on the part of Sadut Ali, that thereupon an ikrarnama was, a year after the marriage, executed by Fyz Ali, by which he substituted three other villages forming part of his zemindary in the place of those three villages, and created a sub-tenure or dependent talook out of the 22 villages as then constituted under the

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*From the judgment of Loch and Hobhouse, JJ., in Regular Appeal No. 128 of 1867, decided 4th February

†From the judgment of Phear and E. Jackson, JJ., in Regular Appeal No. 34 of 1870, decided 26th August

name of Russoolpoor, on which he received a gross rent of Rs. 49.

In the second suit, a considerable contest has been raised as to the genuineness of the ikrarnama, but it is perfectly certain that, by some means or another, the substitution of the three new villages for the three former villages did take place; and that whereas the kabinnama was silent as to the reservation of any rent, the 22 villages were afterwards held upon the terms of paying a rent of Rs. 49.

It will be more convenient, since it is necessary to keep the two appeals in some measures distinct, to consider the objections made to the genuineness of the ikrarnama, when their Lordships come to consider that suit, and to assume that, either by the ikrarnama or some other means, the 22 villages really did become a sub-tenure paying one rent of Rs. 49.

Immediately, upon the death of Fyz Ali, there began a litigation concerning his estate, which has continued nearly up to this time, and constitutes an amount of litigation concerning one estate, which one would fain hope is singular even in India. Their Lordships do not think it necessary to go through the history of that litigation further than may be required in order to show the precise relation in which the parties to these appeals stand to each other.

The first suit was brought by Reazoon Begum, on her own behalf, and as guardian of her infant son Sadut Ali, against Shumsoonnessa Begum, who had got into possession of the whole estate, and had called in question the marriage of Reazoon with Fyz Ali and the legitimacy of Sadut Ali, in order to establish the right of herself and her son to share in the estate.

That suit went through all the Indian Courts, and was ultimately brought before this Committee. In 1844, Her Majesty made a final order affirming the decisions of the Indian Courts, which were in favor of the rights claimed by the plaintiffs.

Pending that litigation, Khajeh Ali Mollah, the father of the party who is the respondent in the first appeal and the appellant in the second appeal, had made advances to Reazoon for the purpose of enabling her to carry on her suit; and, as is usual in India, those advances ended in an arrangement by which she agreed to give him one moiety of what should be recovered in that suit. That agreement was afterwards confirmed by Sadut Ali Khan upon obtaining his majority; and there is no question now upon the present appeals that it was a good and binding agreement, and that it was the foundation of the title of the present Khajeh, who has succeeded to the rights of his father.

It is not immaterial, with reference to some of the arguments which have been addressed to their Lordships at the bar, to observe that, although the agreement was originally for one moiety, which would be 7½ annas of the 15 annas which were finally decreed to the mother and her son, the Khajeh, upon a representation founded on the existence of the sub-tenure and the poverty of Reazoon and her son, agreed to waive his rights as to half an anna, and that the ultimate arrangement was that he should take only ⅓ of the 15 annas. It is, therefore, clear that the ultimate contract between the parties was made with a full knowledge of the existence of the sub-tenure. And if matters had remained as they then were, the rights of the parties would have stood thus: Reazoon Begum would have been entitled to one anna of the zemindary right; Shumsoonnessa Begum would have been entitled to another anna of the zemindary right and also to the talookdary interest in the villages; Sadut Ali Khan would have been entitled to seven annas of the zemindary right; and Khajeh Abdool would have been entitled to seven annas of the zemindary right.

It had been expressly provided by the original decree of the Sudder Court, which was affirmed by Her Majesty in Council, that the villages which formed the sub-tenure were to be taken as separated from the *corpus* of the estate, subject, of course, to any rent which might be payable in respect of them to the zemindars; and the division of the assets of the zemindary between Reazoon and her son on the one side and Shumsoonnessa on the other, was accordingly made on that footing.

The position of the parties, however, was afterwards changed. Shumsoonnessa Begum had died pending her appeal to Her Majesty in Council. It was prosecuted by her heir and brother Hedayetoolah; and he having failed to pay, pursuant to the order in Council, the costs of the appeal, her interest in Fyz Ali's estate which had descended to him, and of which he was then in possession, was attached and put up to sale. It was bought by Sadut Ali, who afterwards transferred the sub-tenure, and possibly the whole of what he bought, to his wife, who is the respondent in the second appeal.

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There is some evidence that, in the first ance, the Khajeh was put into some kind constructive possession of the seven annas he zemindary which had been assigned him. Disputes afterwards took place een the parties, and he found it necessary ring a suit in order to enforce his rights er the purchase. In that suit a final ree was made in his favor in 1853. reupon the rights and position of the ies seem to have been as follow: The of Sadut Ali Khan, Zamoorudoonnessa, he holder of the sub-tenure, was entitled he beneficial interest therein; but whatr rent was payable by her to the zeminy was divisible between those entitled to zemindary according to their respective es; the appellant being entitled to seven s of that rent, whatever it might be. As as the decree had been made in his r, he seems to have conceived the on that he was entitled as zemindar to ance that rent; and he took proceedings wo occasions before he brought the suit ch has given rise to the first appeal, in r to establish his right to enhance. He unsuccessful upon both occasions; and, n the last, doubt was thrown upon his to claim a zemindary right in respect of villages included in the sub-tenure. reupon he instituted the suit out of which first appeal has arisen. The defendants hat suit, Sadut Ali Khan and his wife, ough, as will presently be shown, they on a former occasion, admitted the plaintright to share in the rent reserved on 22 villages, saw fit to contest that right, alleged that no zemindary right in rect of the villages had passed under the chase to Khajeh Allim Oolah.

They also contended that, if any had passed, plaintiff had never received any rents, that, by reason of his non-reception of share of the rent for a period of more n 12 years, his suit was barred by limita-. Formal issues were settled to raise e defences, and the cause was tried upon m. These were the real points upon ch the case was fought in the Courts ow; and it has now been admitted at the by Mr. Leith that he cannot support the of them. It is then conceded that, by son of the transfer to the Khajeh of the en annas share in the zemindary, he bene entitled to a proportionate share of the 49 reserved upon the 22 villages.

It was however contended and fully argued Mr. Doyne that the suit was barred by Statute of Limitations. Their Lordships have fully considered the able argument that was addressed to them upon that point, and they are not satisfied that the Statute of Limitations was a bar to the suit. The circumstance which was chiefly relied upon by the High Court, and made the principal ground of their judgment, was that, in the course of the suit which the Khajeh brought to enforce his rights under the agreement for purchase, a large sum for mesne-profits became due from Sadut Ali Khan to him; that ultimately there was a compromise between them which fixed the amount to be paid at, I think, Rs. 70,000, which sum was actually paid to him within the 12 years. It was argued, however, by Mr. Doyne that the last item of the rent of the villages which could have entered into the sum for which that compromise was made must have been rent which had accrued more than 12 years before the commencement of the suit. Their Lordships are, nevertheless, not disposed to dispute the view of the High Court that the payment of the sum taken to include the arrears of that rent within the 12 years was evidence of a recognition of the title of the Khajeh to the rent, which is sufficient to exclude the notion of an adverse possession for more than 12 years before the institution of this suit.

The case, however, of the respondent does not appear to their Lordships to depend solely upon that admission. There has been throughout this long litigation a good deal of what one may call blowing hot and cold; and it certainly appears that, in the first of the proceedings which were taken anterior to the suit for the purpose of enhancing the rent, the contention of the defendants was this: "True, you are entitled as zemindar "to a proportionate share of the existing "rent of this talook, but you are not entitled "to enhance that rent." Therefore it appears to their Lordships that this is not a case to which the Statute of Limitations could fairly or properly be applied.

That disposes of the points which were really the grounds of defence taken in the Courts in India. It was, however, strenuously argued that the suit ought to fail, because it is a suit for a mere declaratory decree seeking no consequential relief. And the objection, as their Lordships gather, which was so taken at the bar was two-fold: first, that no such suit would lie unless some consequential relief could be granted as ancillary to it; and, secondly, that to entertain such a suit is a matter of discretion in the

Court, and that the Court had in this instance exercised its discretion unsoundly.

Now, with respect to the last of these objections, it might be sufficient to say that if the High Court has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not, upon light ground, interfere with the exercise of that discretion. Nor, assuming that there was a discretion to entertain the suit, do their Lordships think that, in this case, it was unsoundly exercised. The respondent in his last suit for enhancement had been turned round on the ground that he had not any zemindary right in these villages, and he naturally came into the Civil Court in order to have that right ascertained and declared. And if his suit had been dismissed after the parties had joined in the issues in which they did join, the decree would have been a bar to his right to recover even his proportionate share of the rent of the Rs. 49.

Their Lordships have now to consider the first objection.

It must be assumed that there must be cases in which a merely declaratory decree may be made, without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code and in the Court of Chancery upon the analogous provision of the English Statute is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other *forum* in which he is now compelled by statute to bring an enhancement-suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the zemindary title.

Therefore, upon both grounds, it appeared to their Lordships yesterday on the close of the appellant's case that he had failed to show any reason for disturbing the decision of the High Court in the first suit, and that the decree which was the subject of this appeal ought to be affirmed.

Now, it is not unimportant with reference to the second appeal to see what that decree was. It is in these words: "It is ordered "and decreed by the said Court that th "appeal be decreed, and the decree of t "lower Court be reversed. And it "declared that the 22 villages in the suit co "prise a tenure situated within and bei "part of and paying a rent of Rs. 49 to t "proprietors of the zemindary No. 10 on t "towjee of the Collector of Mymensing "comprising five annas one gunda o "cowrie and one krant of Pergunnah Atee "And it is further declared that plaintiff "a proprietor of seven annas out of 15 an "of that zemindary, and that, as proprietor, "entitled to a share of the rent of this ten "in proportion to his interest in the estate. It seems to their Lordships impossible the appellant who was the plaintiff in second suit to go behind that decree, and say that the 22 villages did not constitute tenure within the zemindary, on which gross rent of Rs. 49 was reserved to zemindars.

Having got this decree the Khajeh p ceeded to bring his suit for enhanceme against Zamoorudoonnessa Begum as holder of the tenure. Among the iss settled in that suit there were these: Fi Whether the notice had specified the pa culars required by law to be specified, whether it had been duly served. And second, which was the material one, is these words: "Are the villages in questi "liable to enhancement of rent as stated "the plaintiff, or fit to be exempted fro "increased assessment, being held by defen "ant at a fixed rate in perpetuity unde "lekhun granted by the former zemindar The notice, it was admitted, was a noti which was necessarily given under the 1 section of Act X. of 1859. In the view th Lordships have taken of the second issue, is not necessary for them to consider wheth that notice was sufficient. The Deputy Co lector, who tried the case in the first instanc considered that it was sufficient. Some dou was thrown upon that by Mr. Justice Phe in the High Court. He seems to have co sidered it insufficient; but their Lordshi think it will be far more satisfactory to d cide this case upon its merits, and the que tion raised by the second issue, *viz.*, wheth the rent is enhanceable or not in a s regularly framed.

The foundation of the tenant's title was th kabinnama; and the transaction upon th face of the kabinnama was a transfer of t 22 villages included in it to Shumsoonnessa satisfaction of the one-third of her agre dower. It did not reserve any rent whatev

did not make any mention of, or provision the payment of the Government revenue able in respect of those particular villages; though it did not contain any words of eritance in the strict sense of the term, it not contain any express direction that the ment of the villages granted should be ed to any particular time. The nature e transaction affords strong ground for conclusion that the villages were intended made over absolutely, and for all time; use the woman was entitled to the third er dower absolutely. She might have osed of that as she pleased; and when in of that she took a grant of the villages, presumption is that she was intended to an absolute interest. Again, the here- y nature of her interest seems to be st put beyond a doubt by the decree in irst suit, which is the foundation of the eh's title, because, when she died, her who was appointed to carry on the suit er place, did so, and the decree contains ection concerning these villages, notwith- ing her demise, which implies the exist- of the tenure. Nor does the hereditary acter of the tenure seem to have been ted up to the present time.

may seem strange that no provision made expressly in the instrument for the ent of the Government revenue. But emindar may have been willing to take hole of the Government revenue upon elf; and his doing this may have been lement in the settlement of the terms which the third of the dower was to be up. Of course such a transaction t be impeached by a purchaser of the ndary for arrears of Government revenue. it is nevertheless good against all who title under Fyz Ali Khan.

or can the fact that the instrument is concerning the payment of the Govern- revenue affect the questions raised by appeal; because, even if the grant be to be a grant of the villages subject to ayment of the Government revenue, and emindar may have paid the Government ue on account of the tenant, his right ecover what he had so paid could not into a suit for enhancement of rent, would be a matter for which he must his remedy in a Civil Court.

he question of the ikrarnama is now to onsidered. Their Lordships find that validity of this instrument has been ed by the concurrent judgment of both ndian Courts. They do not deny that may be circumstances which throw some suspicion upon it, or that it is a document which has not satisfied all the officers before whom it appears to have been produced; but upon the whole they can see no sufficient grounds for disturbing the finding of the Courts below. The plaintiff cannot be heard to say that there was not a substitution of three villages for three of those included in the kabinnama; or that the 22 villages were not afterwards held as a subtenure on which a rent was reserved. He comes into the Court, having got a declaration in the other suit that such was the fact, and alleging that by reason of it the relation of landlord and tenant subsisted between him and the defendant, and he fails to show by what means, other than the ikrarnama, the substitution of the villages and the creation of the tenure took place.

Therefore, it seems to their Lordships that they must accept the ikrarnama as established, and act upon it accordingly. If they do that, it appears to them that, inasmuch as the ikrarnama declares the rent to be permanent, the case for enhancement altogether fails, and that the decree of the Indian Courts in the second suit ought also to be affirmed.

The result will be that their Lordships will humbly advise Her Majesty to affirm both the decrees under appeal, and to dismiss each appeal with costs.

The 24th January 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier and Sir Lawrence Peel.

Enhancement of Rent—Act X. of 1859, ss. 15 and 16—Presumption—Onus Probandi—Arrears—Issues.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Nuffer Chunder Paul Chowdhry and another,

versus

Jonathan Poulson.

In a suit for enhancement of rent of an intermediate tenure, where the defence was that the land had been held at a uniform rent from the decennial settlement, and the defendant, seeking to avail himself of the presumption in Act X. of 1859, ss. 15 and 16, proved that the rent had not been changed for 20 years before the commencement of the suit, and thereby threw upon the plaintiff the burden of showing that the rent had been fixed at some later period than the decennial settlement:

* On appeal from the judgment of Phear and Hobhouse, JJ., in Regular Appeals Nos. 2 and 35 of 1868, decided 1st August 1868.

HELD that the plaintiff had succeeded in proving that which was cast upon him to prove, *viz.*, by producing a decree declaring his right to enhance, which had been passed in a suit brought by him against defendant's father under whom defendant claimed.

HELD, also (the Privy Council adopting a decision of the High Court), that, in a suit for arrears of rent at enhanced rates, when the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved.

THIS was a suit for enhancement of rent, to which the defence in substance was that the land with reference to which the question arose had been held at a uniform rent from the decennial settlement, and the defendant sought to avail himself of sections 15 and 16 of Act X. of 1859. The Deputy Collector gave his decision for the plaintiff, and determined upon a certain enhanced rent in pursuance of inquiries which he had made. This decision was reversed by the High Court, who held that the plaintiff was not entitled to enhance.

The question has been reduced to one of comparatively small dimensions. The defendant, as has been stated, relies upon sections 15 and 16 of the Act X. of 1859.

Those sections are in these terms:—

Section 15 says: "No dependant talookdar, or other person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the ryots," which is this case, "who in the provinces of Bengal, Behar, Orissa, and Benares holds his talook or tenure (otherwise than under a terminable lease), at a fixed rent, which has not been changed from the time of the Permanent Settlement, shall be liable to any enhancement of such rent, anything in section 11, Regulation VIII. of 1793, or in any other law to the contrary notwithstanding." Then section 16 goes on to say: "Whenever, in any suit under this Act, it shall be proved that the rent at which a talook or other tenure is held in the said provinces has not been changed for a period of 20 years before the commencement of the suit, it shall be presumed that such talook or tenure has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period."

In their Lordships' opinion, the defendant did establish that the rent at which the talook was held had not been changed for a period of 20 years before the commencement of this suit, and that he thereby cast upon the plaintiff the burden of showing "the contrary" (in the words of the Act), or that the rent had been fixed at some later period, and their Lordships are of opinion that the plaintiff has succeeded in proving that which was cast upon him to prove. His proof consisted mainly in this: that in 1860 a suit was brought, which was decided in 1863 by the High Court, by the plaintiff or his predecessor in title against the defendant's father under whom the defendant claims, for enhancement of rent. The case of the defendant was then this: in the first place he said that no sufficient notice had been proved; secondly, he said that the talook had been granted to him or his predecessor in title in the year 1824 by various pottahs, and that they fixed a uniform mokurruree rent which could not subsequently be changed. But he did not set up any title previous to those pottahs. He did not set up that which was open to him to set up, namely, that he had held at a fixed rent from the Permanent Settlement, or, indeed, 12 years before, which at that time would have been an answer to the case. It should be stated that this suit was decided before Act X., to which previous reference has been made, came into operation. The state of the law then was that he could defend himself by showing an ancient tenure, going back 12 years before the decennial settlement; but he made no case of the kind. He made a case of mokurruree tenure established by pottahs in 18[illegible]. Upon that case the Court below gave a decree to the plaintiff on both points, on the ground that the notice was sufficient, the pottahs not being established, and that the power to enhance had been proved. The High Court upon appeal disagreed with the lower Court upon the first point. They held that the notice was not sufficient, but they proceeded to decide that the plaintiff had a right to enhance.

It has been said that this declaration on their part that the plaintiff had a right to enhance, although he had given no sufficient notice, was *ultra vires;* that, upon failure of proof of notice, the Court had no right to make any such declaration, and, consequently, that such declaration is of no effect; but their Lordships upon this point entirely adopt a decision which is reported in Marshall's Reports of Cases in appeal to the High Court in Bengal, vol. i, p. 523, heard in full before Sir Barnes Peacock, Mr. Justice Steer, Mr. Justice Norman, Mr. Justice Kemp, and Mr. Justice Seton-Karr, which is precisely in point upon this question. It is there stated that, "in a suit to recover "arrears of rent at enhanced rates, when

e question of the liability of the tenure enhancement has been put in issue, and ly tried, a decree may be given declar- g the tenure liable to enhancement, though ice to enhance is not proved." In this the question of the right to enhancement tried, as well as the question of notice, the Court gave a declaratory decree as e right to enhance.

at being so, their Lordships are of opi- that this decree of the Court in 1863 amount to proof sufficient to rebut the mption referred to in section 16 of X. of 1859, arising from 20 years' rm payment of rent, that that uniform ent had extended to the time of the nial settlement. It also amounts to that the rent was fixed at some later d.

this ground, therefore, their Lordships f opinion that the plaintiff has satisfied rden of proof which was thrown upon This decision of their Lordships is much in accordance with a case in the Court, on the 15th February 1865, of al Doss Bose *vs.* Sheikh Golam Surwur,* is thus described in the marginal : "The bringing of a suit by a landlord recover arrears of rent at enhanced rates, der Act X. of 1859, cannot annul the er decree of a competent Court, de- ing the ryot's holding to be liable to ancement, by entitling the ryot (on of of payment of uniform rent for 20 rs) to claim the benefit of the presump- under section 4." It is to be observ- at section 16 is almost in the same as section 4; the one referring to ryots, he other to under-tenants or talookdars. th respect to the question of the pot- which were put in evidence by the de- nt in the former suit, which has been ed to, but which were not believed to uine at that time, either by the Court t instance or the Court of Appeal, it rs that these pottahs were rejected also e present suit, both by the Court of instance and the Court of Appeal. Lordships are not prepared to say that ejection was wrong; but, even if they been received in evidence, their Lord- are of opinion, upon referring to them, they would not have established the ntion of the defendant in this suit, that d held by a uniform tenure, commenc- t all events, as early as the decennial ment. The effect of those grants does not appear to be to show a mere continuance of possession, but, according to their Lordships' view, they rather point to the creation of a new title.

For these reasons, their Lordships are of opinion that the decision of the High Court should be reversed; that the appeal of the respondent from the Court of the Assistant Collector to the High Court should be dismissed with costs; and that the last-mentioned judgment of the Assistant Collector should be confirmed. Their Lordships will humbly advise Her Majesty to this effect. The respondents will pay the costs of this appeal.

* 2 W. R., Act X. Rulings, 69.

The 1st February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Ticcadars—Rights of Occupancy—Act X. of 1859, s. 6.

Special Appeal from a decision passed by the Judge of Patna, dated the 6th September 1872, affirming a decision of the Moonsiff of that District, dated the 27th March 1872.

Woomanath Tewaree (Plaintiff), *Appellant,*

versus

Koondun Tewaree and others (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

No one for Respondents.

A person occupying land merely as the assignee of the zemindar, and cultivating because of the opportunity thus afforded, cannot, under color of that character, acquire rights adverse to the zemindar, or claim the benefit of Act X. of 1859, s. 6.

Phear, J.—In this case, it appears from the findings of fact come to by the Lower Appellate Court that the plaintiff was first receiving the rents and profits of certain land under a ticca lease from the zemindar. During the pendency of the lease, he availed himself of his position as ticcadar to cultivate a portion of the land which was covered by the lease, and, after the expiration of the ticca lease, he continued in occupation of the portion which he so cultivated. The present suit is brought by him in order to establish a right of occupancy to this portion of the land under the provisions of section 6, Act X. of 1859.

The Judge has found that the period of time during which he occupied after the termination of the lease is not sufficient to confer the right for which he sues. And the Judge is further of opinion that the period of time during which he cultivated while he was ticcadar cannot be counted in addition to the subsequent period of cultivation for the purposes of section 6.

It seems to us that the Judge is right in this respect. The words of the section are: "Every ryot, who has cultivated or held land for a period of twelve years, has a right of occupancy in the land so cultivated or held by him, &c." And we think that while the plaintiff was ticcadar, and so far as he actually cultivated land covered by the ticca lease, he only did so because of the opportunity afforded in his capacity of ticcadar; he was not a ryot. At that time he was simply assignee of the zemindar, and he could not, we think, under color of that character alone, acquire rights adverse to the zemindar. The right of occupation provided for by section 6 is distinctly given to one who occupies as a ryot only. And, therefore, we think that the person who is able to occupy as being merely an assignee of the zemindar, and not on the footing of any other right, is excluded from the benefits of that section. This is the only ground of appeal which is put before us, namely, an objection in law to the Judge's ruling in this respect. Therefore we think the appeal should be rejected.

The 11th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Joint Hindoo Family—Separate Possession—Presumption—Onus Probandi.

Case No. 592 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 10th January 1872, reversing a decision of the Moonsiff of Bhangah, dated the 31st July 1871.

Taruck Chunder Totadar and others (Plaintiffs), *Appellants*,

versus

Joodheshteer Chunder Koondoo (Defendant), *Respondent*.

Baboo Bhugobutty Churn Ghose for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

Every Hindoo family is presumably joint in f worship, and estate; and the presumption is that remains undivided.

If a member of such family is found to be in pos sion of any property, the family being presumed to joint in estate, the presumption would be, not that was in possession of it as separate property acqu by him, but as a member of a joint family. It is the person who sets up a different state of thing give evidence thereof, and meet the presumption.

Several cases on the point dissented from.

Couch, C.J.—THIS suit was brought the plaintiffs to have their rights, under *miras* lease obtained by their ancestors o certain share of a tenure known by the na of Buran Mollah, confirmed and declared: their case was that Issur Chunder, the fa of the second defendant, Brijo Kishore, father of the first, and Hurish Chunder, father of the second set of plaintiffs, be three uterine brothers, while living joi and in commensality acquired, with the of their joint funds, a mokurruree mowro lease on the 15th of Cheyt 1264.

The defence set up was that the lease in fact, granted by the lessors to Is Chunder, after the dissolution of the co mensality between the co-parceners, and t at the time of the granting of the lease, th was a verbal stipulation to the effect t upon the payment of the bonus-money, lease would be returned to the lessor, that the defendant received back the bon money.

It seems that the issues had been fra by the predecessor of the Moonsiff who t the case, and that the latter modified th and framed, amongst others, this: "Whet "the *miras* lease in respect of the share "the mouzah in dispute had been acqui "by Brijo Kishore, the father of the f "plaintiff, Hurish Chunder, the father "the second plaintiff, and by Issur Chund "father of defendant No. 2, while they we "living jointly and in commensality, and h "been held by them in joint tenancy, a "whether, after their decease, the seco "defendant and the plaintiffs had been joi "in possession of the property, or whet "the plaintiffs had been dispossessed of "property in suit by the first defendant and, secondly, "whether Issur Chunder, "father of the second defendant, had acqui "a *miras* lease in respect of the property "suit after severance of the commensa

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ith the fathers of the plaintiffs," which really involved in the first issue.

he Moonsiff then tried the case, and he in his judgment: "It has been satisfacrily proved that the said Issur Chunder d his brothers, Brijo and Hurish Chunder, eld the property in dispute jointly, both hile they were living in a state of comensality, and also after a severance of the mmensality, and that, after their death, e present plaintiff and the second defendt have also held the said property intly;" and then noticing what is laid n in Mr. Norton's work on Evidence, and ng that it appeared that the three brothers living in a state of family-partnership, ays: "A heavy burden lies on defendant o. 1 to prove the fact of the separate quisition of the property in suit, and the fendant No. 1 has totally failed to scharge the said *onus*." He then decreed vor of the plaintiff, ordering that he ld recover possession of the share which laimed.

he case came on appeal before the Subore Judge, and he, after noticing the ee the Moonsiff had made, said: "With ference to the second issue, I find that it admitted on all hands that the *miras* se in respect of the property in suit was ained in the name of Issur Chunder. herefore, under the precedents quoted in e margin, the *onus* of proving the fact of e acquisition of the leasehold property the three brothers, namely, Issur hunder Poddar, Brijo Kishore, and Hurish hunder Poddar, the ancestors of the aintiffs, with the aid of joint ancestral nds, and at a time when the three others were living in a state of familytnership, was upon the plaintiffs." I n of opinion that the plaintiffs have failed discharge the said *onus* satisfactorily." he decreed the appeal, setting aside the nsiff's decision, and ordering the suit to lismissed.

his judgment, he also said that it had n proved that the *miras* lease was acquired Issur Chunder, who had paid the bonus essary for obtaining it, and as there was evidence to show that the fathers of the ntiffs or the plaintiffs themselves had any est in the said leasehold estate, it is as all necessary to put the defendant to trict proof of his title. He, therefore, upon the plaintiffs the burden of ing that the property had been acquired he family jointly, instead of putting the en of proof upon the defendant as the Moonsiff had; and the question raised in this special appeal, and upon which, seeing the small amount of evidence there is in the case, the decision of the suit really depends, is, upon which party ought the burden of proof to have been laid.

Now, the Judicial Committee of the Privy Council, in the case in 12 Moore's Indian Appeals, page 523, Neel Kristo Deb Burmono against Beer Chunder Thakoor,* have laid down the rule by which this Court must be guided. At page 540, their Lordships say: "The normal state of every Hindoo "family is joint. Presumably every such "family is joint in food, worship, and estate. "In the absence of proof of division, such is "the legal presumption; but the members "of the family may sever in all or any of "these three things. The family in which "a title to a kingdom exists in one member "follows this general law, but it follows it "in part only, for the succession to a king-"dom is an exception to it from the very "nature of the thing: the family may have "property distinct from that to which a sole "heirship belongs, and may continue joint." These observations have reference to the particular case before their Lordships, but here they lay it down in most distinct terms that every Hindoo family is presumably joint in food, worship, and estate; and the same law had been laid down in a previous case in 9 Moore's Indian Appeals, page 92,† where it is said that the presumption with regard to a Hindoo family is that it remains undivided.

In another case before the Judicial Committee, reported in 3 Moore's Indian Appeals, page 229, Dhurm Doss Pandey against Shama Soonduree Debia,‡ we find the law laid down, which is applicable to the case before us. At page 240, their Lordships say: "It is allowed that this was a family "who lived in commensality, eating together, "and possessing joint property. It is al-"lowed that they had some joint property, "and there can be no doubt that, under "these circumstances, the presumption of "law is that all the property they were in "possession of was joint property, until it "was shown by evidence that one member "of the family was possessed of separate "property. Such evidence may be received, "but their Lordships are of opinion that "such evidence has not been given in "this case with regard to any part of the

* 12 W. R., P. C., 21.
† 1 W. R., P. C., 30.
‡ 5 W. R., P. C., 39.

"property." * * * * "Now, what has been "relied upon with regard to a portion of the "property has been chiefly that it was purchased in the name of one member of the "family, and that there are receipts in his "name respecting it; but all that is perfectly consistent with the notion of its having "been joint property, and, even if it had "been joint property, it still would have "been treated exactly in the same manner. "We have heard from the highest authority, "from the authority of Sir Edward East "and Sir Edward Ryan, whose most valuable assistance we have in this case (and "it gives me a confidence that I should not "otherwise have felt) that the criterion in "these cases in India is to consider from "what source the money comes with which "the purchase-money is paid. Here, there "has been no evidence given that the appellant had any separate property, or that it "was from his funds that any part of the "purchase-money was paid; therefore, I "think that, so far on this part of the case, "no difficulty can be entertained, and that the "whole of the property must be considered "as joint property."

Now, with regard to what their Lordships say as to the family being possessed of property, and that the presumption of law is that all the property the family is in possession of is joint property, the rule that the possession of one of the joint owners is the possession of all would apply to this extent —that, if one of them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him, but as member of a joint family. It being so, until in this case it is shown that Issur Chunder had acquired it separately, and it was property which could by law be treated as a separate acquisition, the presumption is that it was the joint property of the family. It was for the person who set up a different state of things from what is to be presumed, to give evidence of it. It was the duty of the defendant to meet the presumption which arose from the state of the family and the possession by one of them of the property. That appears to me to be the result of the judgments of the Privy Council which I have referred to.

There is, no doubt, a conflict of decisions in this Court upon this subject. I can see no way of reconciling them. We must follow what has been laid down by the Court of Appeal from this Court; and I may observe that in decisions of this Court which are in conflict, the judgments of the Privy Council do not appear to have been noticed. In some they have not been noticed at all; in others, I do think they have not been noticed in the manner they would have been if the attention of the Judges had been directed to them. I have no doubt it frequently happens in this Court that all the authorities bearing on the subject are not presented to the Court in the argument, and this sometimes leads to a conflict of decisions.

I have said there are various decisions in this Court which cannot be reconciled with the law which I feel bound, by the judgment in the Privy Council, to lay down. The case in the 10 Weekly Reporter, page 332, which was quoted to us, is certainly contrary to the decision of the Privy Council. As to the case at page 122 of the same volume it may be said that facts were found there which rebutted the presumption, and so it cannot be considered as laying down any rule as to the *onus* of proof. So the case in the special number of the Weekly Reporter, page 557, is also contrary to the decision of the Privy Council. I must adopt the judgment of the Court of Appeal rather than the law laid down in that case. The case in 8 Weekly Reporter, page 271, is consistent with the decision of the Privy Council.

It was argued before us, and reference made to a case in the same volume of the Weekly Reporter, page 270, that it was not shown here that there was any nucleus of property by means of which this acquisition by Issur Chunder might have been made and that at least the plaintiff ought to have given some evidence of that. I must observe that what is said in that about there being a nucleus of property is only a *dictum*. No doubt it would be very useful for the plaintiff to show that, but I cannot agree that he is bound to do it. That *dictum* seems to me to be inconsistent with the doctrine laid down by the Judicial Committee.

There is one more case which I must notice that is directly opposed to the decision of the Privy Council. It is reported in 1 Bengal Law Reports, page 164, a ppellate cases, and also in 10 Weekly Reporter, page 19. With every respect for the learned Judge who pronounced that decision, I feel obliged by the superior authority of the Privy Council, to differ from it. The law laid down by the Judicial Committee in the case

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n 12 Moore's Indian Appeals,* does not ppear to have been presented to the learned udges. Probably, if it had been, they ould, whatever their own opinion might e on the subject, have considered that they ere bound to follow it.

The result of a consideration of the uthorities appears to me to be that the ubordinate Judge was wrong in what he id down as to the *onus* of proof. He imroperly put upon the plaintiff the *onus* of roving that (to use his own words) "the roperty was acquired with the aid of joint nds, and at a time when the brothers were ving in a state of family-partnership." hat is opposed to the authorities which this ourt is bound to follow, and on that acount his decision must be reversed, and the se must be sent back to him for re-trial. he costs of this appeal will follow the sult of the suit.

Glover, J.—I am of the same opinion.

The 14th February 1873.

Present:

he Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges*.

dian Wills—Construction—Rule of Interpretation.

Case No. 112 of 1873.

egular Appeal from a decision passed by the Judge of Dacca, dated the 15th February 1872.

P. D. Broughton, Administrator-General of Bengal and Executor appointed under the will of the late Abraham Pogose (Defendant), *Appellant*,

versus

J. G. N. Pogose and another (Plaintiffs), *Respondents*.

Mr. J. T. Woodroffe for Appellant.

The Officiating Advocate-General for Respondents.

In regard to a will, which was not to be construed ording to English law, but according to equity and d conscience, the rule of interpretation was held to that, unless a contrary intention appeared, the te given should be considered an absolute one. he words "on his (devisee's) demise, his sons shall " were held only to describe what the testator ght would really follow from what he had done, as not affecting the absolute character of the gift.

* 12 W. R., P. C., 21.

Couch, C.J.—THE plaintiffs in this case sued for possession or a declaration of their title to certain property which is mentioned in the schedule to the plaint, on the ground that their grandfather, Nicholas Marcar Pogose, deceased, having, by his will, dated the 22nd of Aughran 1236, devised unto them all his estates and all his rights and properties to be divided equally between them, with the exception of certain gifts and legacies, they are entitled to the said estates and properties in equal proportions; that their grandfather, by his will, bequeathed to Abraham Pogose, whose executor the defendant Mr. Broughton is, the properties mentioned in the schedule at the foot of the plaint, for the term of his life, without making him absolute owner, and that, although by the will there was a devise over to the sons of Abraham Pogose, still as he died without issue, the properties devised to him by the will enured to the plaintiffs; and that the defendant had entered into possession of them, and refused to deliver possession. The question between the parties depends upon the construction which is to be put upon the will of Nicholas Marcar Pogose.

As there seemed to be some doubt whether the translation of the will in the paper-book was accurate, we have had the will again translated.

The terms of the bequest to Abraham Pogose are as follow: "I bequeath to Akram "Baba as *selamutty* my talook Joar Narain "Pasha in the District of Backergunge, and "Joar Singhosree and Shakchoota and Kismut "Bhoosa Baree, together with Bangal Kandee "and Najar Kandee, in the District of My-"mensingh, and Rs. 6,000 in cash. He shall "enjoy the profits of the aforesaid talook. "On his demise his sons shall get. The "mookhtears shall make over to the satisfac-"tion of Akram Baba."

We have to construe this will according to equity and good conscience. The testator does not appear to have been a person whose will would have to be construed according to the English law, and the rule which I think we ought to adopt is that, unless a contrary intention appears, we should consider that the estate given is an absolute one. That is the rule which has been made the law of England by the Legislature in the Wills Act, and it is admitted by all persons to be a most salutary canon of interpretation of wills. The fact that the Legislature has considered it right to enact as a rule of interpretation in England speaks most strongly in its favor; and it has been adopted

in this country with regard to certain wills by section 23 of Act XXV. of 1838. Certainly, when we have to construe a will made by this person, we ought not to apply the technical rule of English law, that, where there were no words of inheritance, the estate was only to be a life-estate.

Then, applying to what the testator has said the rule that we must consider the estate to be absolute until a contrary intention appears, let us see whether it can be said that a contrary intention appears. He bequeaths the talooks and Rs. 6,000 in cash. If we stop here, we cannot say that his intention was anything else than to give the property absolutely; because we cannot suppose that he intended to give the Rs. 6,000 in cash otherwise than absolutely. He did not intend to give only a life-interest in it, and yet it is in the same bequest as the talooks. We should not be justified in saying that, when he included all in one bequest, he meant by the words "I bequeath" to give the talooks for life only and the cash absolutely. The fair meaning of this part of the bequest seems to me to be that he intended to give, and considered he was giving, the property absolutely to Akram Baba, who apparently was his natural son.

Then, do the words which follow, "He shall enjoy the profits of the aforesaid talook; on his demise, his sons shall get," show an intention to limit the gift which he had made in the previous part of the sentence to a life-estate.

It appears that when the will was made, Abraham Pogose had only one son, and that apparently not legitimate. The testator may have intended to include him by the term "sons," but apparently he did not intend this particular son to be the sole object of his bounty. If he had, there might have been some pretence for saying that he meant the property to be enjoyed by the father for life, and afterwards by the son. But he says, that, after his demise, "his sons shall get," referring to the succession which, after Abraham Pogose's death, would naturally take place, if he did not part with the property in his lifetime, which the testator probably thought was not likely to happen. I think these words, instead of showing an intention on the part of the testator to give to Abraham Pogose the talooks for his life only, and make a gift by the will to such sons as Abraham Pogose might have only described, what, the testator thought, would really follow from what he had done.

The case which Mr. Woodroffe quoted from 12 East, page 515, resembles the present. There it was a devise to a daughter and her heirs during their lives, and it seems to have been contended that the devisees were to take life-interests in succession; but Lord Ellenborough said that he considered the words were merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could, in fact, only enjoy the benefit of it for their lives. I think we cannot say that there is in this will an expression of an intention that Abraham Pogose should take other than an absolute estate in this property.

It is true that in a subsequent part of the will there is another bequest to him of a house. It is: "I bequeath to Akram Baba, "as *selamutty*, the one-storied house which "I am getting constructed immediately on "the north of the road in Mohulla Pokere"tolee, formerly belonging to Johanne"Manook." Here there are not such words as were used in the previous bequest. But I do not think that the omission to say anything in that part of the will about taking the profits for his life, is sufficient to lead us to think, that, in the former part, those words were introduced with the intention of creating a life-estate only. There seems to be no reason for thinking that the testator intended to make any such distinction between the two properties which he was bequeathing to Abraham Pogose. That he, or the person who drew the will for him, was acquainted with the expression "during life," and might have used it if the intention had been to give only a life-estate, is clear from another part of the will where the words "during his lifetime" are used with reference to a gift to his daughter.

I think, therefore, applying to this will what I have said I consider to be the rule of interpretation which a Court of Equity ought to adopt, that the estate was an absolute one, and that the plaintiff's suit must consequently be dismissed. The decree of the lower Court will be reversed, and the plaintiff's suit dismissed with costs in both Courts.

As Mr. Justice Mitter is not present, I have to add that he concurs in this judgment.

Glover, J.—I concur.

The 21st February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Certificate to collect Debts—Act VIII. of 1859, s. 170—Prosecution for Forgery—Judge's Sanction.

Case No. 297 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 21st September 1872.

Seetaram Sahoo (Petitioner), *Appellant,*

versus

Sheo Golam Sahoo (Opposite Party), *Respondent.*

The Advocate-General, Mr. J. T. Woodroffe, and *Baboos Mohesh Chunder Chowdhry* and *Kalee Kishen Sen* for Appellant.

Mr. J. H. A. Branson and *Baboos Romesh Chunder Mitter, Chunder Madhub Ghose,* and *Taruck Nath Sen* for Respondent.

Appellant having applied to the Judge for a certificate to collect the debts of one R, whose adopted son he claimed to be, referred in evidence to an ikrarnama of adoption, which he filed a copy procured from the Kazee's books, alleging that the original had been made away with by an agent who had been bought over by his opponent. In the course of re-trial of the case on remand, the Judge required the petitioner to attend for the purpose of examination; and as the petitioner did not after warning attend, and assigned no good cause for his absence, upheld his former decision, and rejected the application:

HELD that the Judge exercised the powers conferred by s. 170, Civil Procedure Code, and that it was a proper exercise of discretion to take the course which he did take at that stage of the proceedings:

HELD, however, that as the *factum* of the ikrarnama was not tried, and no evidence taken as to its registration, and no witnesses called in connection with the copy which was filed, it was unfortunate that the Judge gave his sanction to the prosecution of the petitioner on a charge of having forged the alleged copy, as such sanction should not be given before all the testimony is heard, and a *primâ-facie* case made out.

Quære.—Was the Judge's sanction necessary?

Phear, J.—IN this case, the appellant was petitioner before the Judge, asking to have the grant of a certificate which should authorize him to collect the debts of one Ram Churn Sahoo, deceased. He claimed to be the adopted son of Ram Churn Sahoo; and if he is the adopted son of Ram Churn Sahoo, no doubt the Judge ought to grant him the certificate. As the learned Chief Justice said on the occasion when the case was last up before this Court: "The decision of the question who is entitled to have the certificate is certainly not conclusive, but the party has a right to have the question tried and determined."

The Bench before which the case then came thought that the question had not been fairly tried and determined, and accordingly the case was sent back to the Judge for re-trial. The re-trial has now been had, and the Judge has refused the plaintiff's application substantially on the ground that the petitioner has failed to make out his adoption or his claim by adoption.

The petitioner's case is shortly this: That he was adopted by Ram Churn Sahoo; that he lived with Ram Churn Sahoo after the adoption, and again for a still longer period with Ram Churn Sahoo's widow after his death, as his regularly recognized adopted son; that some years after Ram Churn Sahoo had adopted him, he executed a document, which has been called an ikrarnama of adoption, and described as a deed to some extent dealing with the property, and recognizing the adoption which had been before made. The petitioner says that he had this ikrarnama of adoption, and sent it to Calcutta by the hand of an agent, Ram Gobind, in the early part of 1872, for the purpose of getting some advice in the matter of his case, or at any rate for some purpose connected with his case; that in May 1872, after the case had been sent back by this Court for re-trial, he found that Ram Gobind had been bought over by his opponent, and that consequently he could not get the original document out of his hands; he was therefore driven to supply its place in this proceeding by a copy which he procured in May from the Kazee's books, where a copy of the original document had been made upon its being filed before the Kazee about the time when it was executed. The petitioner says that he filed—in fact, there is no doubt that he filed—a paper purporting to be such a copy in the Judge's Court in September.

Now, in order to make out this case, it is clear that it became incumbent upon the petitioner, in the first place, to prove the *factum* of the original adoption, and the fact of his living in the house of his adoptive father as he states that he did; also to prove the *factum* of the execution of the ikrarnama; further to satisfy the Court by trustworthy evidence that this ikrarnama had been, in the early part of 1872, in his possession, and entrusted by him to the custody of Ram Gobind; next, that he had endeavoured to get this document back from Ram Gobind, but had practically failed not-

withstanding that he had made every reasonable effort for the purpose. Next, again, in due course, he would have to prove that the original document had been registered and copied by the Kazee; and further that the document which he filed in the Judge's Court in September was, in fact, a copy of that copy of ikrarnama in the Kazee's register.

Now (as we understand), in the trial in the Court below, the petitioner did enter upon the course of proof such as we have sketched out. He did give some evidence, perhaps as good as the nature of the case would admit (on that we say nothing) of the original *factum* of adoption, and also we think of his having lived in the household of his adoptive father in accordance with the alleged adoption. Whether he tendered evidence of the execution of an original ikrarnama or not has not been made very clear to us. But unquestionably he did endeavour to satisfy the Judge that he had handed over an original document to Ram Gobind, and the Judge at that stage of the inquiry considered that the story was so remarkable as certainly to require that the petitioner himself should give his testimony in order to substantiate it and to make it trustworthy. Thereupon, he told the vakeels who were conducting the case of the petitioner before him, that the petitioner must come the next day for the purpose of being examined; and he also, as we understand, issued a formal order to that effect, which, the vakeels undertook, should be given to the petitioner. On the following day, it does not seem that any proof of the actual service of the order was tendered to the Court. But the petitioner did not, in fact, make his appearance, and the vakeels who represented him offered excuse for his not having done so in obedience to the order. It must, therefore, we think, be taken as being beyond doubt that the petitioner did receive notice of his having been required to attend for the purpose of examination; that he did not object to the sufficiency of the notice, and also that he did not obey its exigency. The Judge in his judgment says: "The vakeels of the petitioner had been "warned on the previous day, Friday, that "unless Seetaram Sahoo was produced on this "day, Saturday, the petition for certificate "would certainly be rejected, and now" (the Judge was, we suppose, writing as on that Saturday) "they have come forward with "this false and frivolous excuse for his non-"attendance. It is clear that Seetaram "Sahoo is keeping away on a false pretext "to avoid giving evidence, and his evidence "would only be of value if taken before he "was sufficiently tutored. Under these cir-"cumstances, I direct Seetaram Sahoo's ap-"plication for a certificate be dismissed, and "uphold my former decision granting a cer-"tificate to Baboo Sheo Golam Sahoo"

It thus seems that the Judge did, on this occasion, exercise powers given by the provisions of section 170 of the Civil Procedure Code. He had found it necessary to have the evidence of the party to the suit on a material point of the case; he had summoned that party to come and to be examined, and he warned him that if he did not come, his case would be dismissed. It appears to us that the Judge was right in thinking that the testimony of the petitioner was material at the point which the case had reached, and we think that it was a proper exercise of discretion to take the course which he did take in reference to the petitioner at that stage of the proceedings; he has understood the refusal of the petitioner to come to be examined, without giving good cause for his absence, as affording most material evidence against the goodness of his case. And we cannot take upon ourselves to say here upon appeal that the Judge was not entirely right in that matter.

It will be observed that the trial by reason of these circumstances stopped at an early period of its course. The *factum* of the original ikrarnama was not, as we understand, tried at all. The document which the petitioner desired to use as a copy of the ikrarnama was not in any sense proved or disproved; it was left simply on the file of the Court, and no exercise of the judicial discrimination or discretion was in any degree directed to it. No witnesses were called by either party to show when the copy was made, where it came from, what its character was, or the extent of its validity. There was, in truth, no evidence taken as to the original registering of the ikrarnama in the Kazee's book. In short, the whole of the case was left a blank after that point at which the Judge, using the discretion which he had, stopped the hearing, and gave a decision against the petitioner.

We do not make these remarks with the intention of impeaching the exercise of discretion by the Judge in the matter of the trial. We have already said that in our judgment he was justified under the circumstances of the case in taking the course which he did take. But, after giving his decision in the matter of the petitioner's application for a certificate, he went on to give his sanction for the prosecution of the

titioner on a charge of having forged the cument which was filed by him in Septem-r, and alleged by him to be a copy of the iginal ikrarnama, or copy of the copy in e Kazee's book.

We think it is unfortunate that the Judge ought it right under all the circumstances the case to give that sanction in the way which he did give it. It appears to us that e Judge ought not in any case to sanction prosecution of a witness, or of a party a cause for the forgery of a document put ward in the course of the trial of that ase, without having first received and ertained all the testimony available at trial, and bearing upon the question of gery or no forgery, and without having, on that evidence, satisfied himself that there a *primâ-facie* case made out for the rge. The purpose for which the sanction rendered a condition precedent to the rge being entertained in the Criminal urt is the protection of an innocent accus-person from the malice of his opponent, d obviously this protection is likely not to afforded when needed if the Judge does in *all cases* carefully scrutinize the evant evidence before he gives his sanc-n. We have already mentioned that, in instance, the Judge did not discuss or e consideration to any evidence which bore on the question of forgery at all. The cument which is said to be a forged docu-nt was not dealt with by him in Court as idence between the parties, and neither e had an opportunity given to him either supporting it or of impeaching it. We st admit that the course which the Judge k in thus giving his sanction has caused us ne considerable embarrassment in the con-eration of this case; because coming up re, as the case has come up on regular ap-al, we have felt in some degree that we are und even in this collateral matter to set t right which the Judge, as it appears to , has left in an unsatisfactory condition to the least of it.

On the whole, however, having given now ne little time to the consideration of the pers before us, we have come to the con-sion that the decision of the Judge in the tter of granting the certificate ought not be interfered with, because, as we before id, we think he took a course with regard this which he was perfectly justified in king, and we are not in a position fairly to rule the exercise of discretion which he ade.

And the other matter of the sanction which is given to the criminal trial must remain as it is, for it is probably more than doubtful whether as strict matter of law—inasmuch as this document was not put in evidence, and dealt with as evidence at all, but merely had a place upon the Judge's file—probably doubtful whether the Judge's sanction for the prosecution was necessary.

We think, therefore, the appeal must be dismissed with costs.

The 21st February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Application for Review—Proceedings under Act XIV. of 1859, s. 20.

Case No. 316 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 31st May 1872, reversing an order of the Subordinate Judge of that District, dated 19th December 1871.

Bibee Luteefun and another (Judgment-debtors), *Appellants,*

versus

Rajroop Singh (Decree-holder), *Respondent.*

Moonshee Mahomed Yusuf for Appellants.

Baboos Romesh Chunder Mitter and *Nil Madhub Sen* for Respondent.

Applications for review cannot be treated as proceedings taken to keep a decree alive under Act XIV. of 1859, s. 20.

Phear, J.—In this case the respondent obtained a decree on special appeal in this Court in 1862, which affirmed the decree of the Court below. He took no steps to execute either the decree obtained by him on special appeal, or the decree of the Courts below, until he made application to the Moonsiff's Court in June 1871. But, in the interval, he had made various applications to this Court for a review of the judgment which he obtained in 1862; all which applications for review failed.

The question now is whether the application for execution made in June 1871 is or is not barred by the operation of section 20, Act XIV. of 1859. The words of that section are: "No process of execution shall "issue from any Court not established by "Royal Charter to enforce any judgment,

"decree, or order of such Court, unless some "proceeding shall have been taken to enforce "such judgment, decree, or order, or to keep "the same in force within three years next "preceding the application for such execu-"tion."

Now it seems to us impossible to construe the various applications for review which were made to this Court as proceedings to enforce the judgment of 1862 or any of the preceding judgments, or, in the alternative, to keep the same in force. The object of those applications was distinctly to alter the judgment which had been obtained, and to procure a new judgment or decree to be passed. It appears to us that we cannot, in common sense, say that an endeavour to obtain a new and a more favorable judgment is a proceeding taken to enforce or to keep alive the judgment which it is thus desired to supersede.

The Full Bench decision, which is reported in 7 Weekly Reporter, page 521, has been appealed to by the respondent. But we see nothing in that decision which tends in any way to support the respondent's case. There the Full Bench decided that appearance by a decree-holder at the hearing of the application for review, in order to oppose that application, and to sustain the decree which he had got, was a proceeding taken for the purpose of keeping his decree in force. It seems to us plain enough that it was so. In this instance, it is the decree-holder himself who is making the application for review, and was using his best endeavours to get the original decree set aside, and a new one made. We may add that one of the applications, at any rate, for review was rejected so far back as 1866, and in the application which was made subsequently to that date, no sort of attempt appears to have been made by the applicant to show good cause for being out of time. That fact alone would go very far in our opinion to show that these various applications were not *bonâ-fide* proceedings on the part of the applicant.

But, however, this may be, for the reasons we have already given, we think that the view which was taken by the Moonsiff in this case was correct, and that the Judge was wrong in considering that the applications for review ought to be treated as proceedings falling under section 20 taken for the purpose of keeping the decree alive.

We think the execution of the decree is barred by lapse of time. The order of the Judge for issuing execution must be reversed with costs.

The 21st February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Appeal to Privy Council—Suspension of Execution—Limitation.

Case No. 269 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 3rd August 1872.

Gunesh Dutt Singh (Judgment-debtor), *Appellant,*

versus

Mungree Ram Chowdhry and others (Decree-holders), *Respondents.*

Mr. R. E. Twidale and *Baboos Unnod Pershad Banerjee, Chunder Madhu Ghose,* and *Kalee Kishen Sen* for Appellant.

Mr. C. Gregory and *Baboos Romesh Chunder Mitter, Aubinash Chunder Banerjee* and *Boodh Sen Singh* for Respondents.

Where a judgment-debtor who has appealed to the Privy Council obtains a *rule nisi* from the High Court suspending execution until security is given, and the rule is subsequently made absolute, it does not operate against the decree-holder in the matter of time; limitation not running against him until the result of the appeal is known, or the rule otherwise falls to the ground.

Phear, J.—It appears to us that the view taken by the Subordinate Judge is substantially correct.

The decree-holder obtained a decree in this Court in his favor on the 7th March 1866, and at that time it was the final decree *inter partes* in that suit. On the 9th May of the same year, he applied for, and obtained an order for execution of that decree. We understand that attachment was issued, and even further orders were made in pursuance of his application for execution, when, in September 1866, the judgment-debtor having in the meanwhile, appealed to the Privy Council, obtained a *rule nisi* from this Court suspending execution until security should be given; and this rule was made absolute in January 1867. It seems to us that the effect of that rule was to hang up, so to speak, the decree-holder's proceedings in execution until the period of time had elapsed during which that rule was operative. This is the effect of an appeal to the Privy Council against the judgment of this Court the

b

Court is prevented from allowing execu-
n to issue without taking security from
decree-holder; and we think that a rule,
pending execution until security be given
der those circumstances, must not be taken
operate against the decree-holder in the
ter of time, but that its true operation is
t lapse of time so to speak is suspended
il the result of the appeal to the Privy
uncil shall be known, or the rule otherwise
to the ground.

We are told that the appeal to the Privy
uncil resulted in a judgment in favor of
decree-holder in February 1872, and on
t date we think that the rule suspending
ecution ceased to have operation. But
cording to the view that we have taken,
period of time that elapsed between the
e when the rule was obtained, and the date
the final decision of the Privy Council,
t be considered as taken out of the execu-
-proceedings. If this be so, then the
ewed application for execution, which we
k was made in April 1872, was apparently
hin time.

Strictly speaking, perhaps, it is unneces-
y having stated thus much that we should
ress any opinion upon the other branch
the argument which has been submitted
s, namely, that which bore upon the true
ct of the final order of the Privy Council.
, if it were necessary, we should certainly
disposed to say that that final order,
ough not itself a decree in the suit, is an
er which the Courts of this country are
nd to obey in framing the final decree.
may not always become necessary under
order which the Privy Council has passed
ually to put in words a new decree, and
seems to have been the case in the
ent instance where the Privy Council
fined itself to affirming the last decree of
Court in this country. Under such cir-
stances as these, it is sufficient to allow
decree already passed to retain its exist-
form, but, nevertheless, we think its date
the final decree between the parties to
suit must, by the effect of the Privy
uncil's order, be drawn down to at least the
e of that order.

If the Privy Council's order has the effect
reversing or modifying the decree which
passed by the highest Court in this
ntry, then no doubt upon the receipt of
t order here it would be necessary to
w up an entirely new decree before execu-
n could be formally issued. In that case
re could be no question we apprehend as
the date which this new decree ought to bear. Thus, it seems to us under the two aspects in which the case has been presented to us, in both alike, the decree-holder is entitled to succeed; and this appeal to us from the decision of the Subordinate Judge ought to fail.

The appeal is dismissed with costs.

The 21st February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Costs—Cross Awards—Decree—Execution.

Case No. 306 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Gya, dated the 25th July 1872.

Amjud Ali Khan and others (Judgment-debtors), *Appellants,*

versus

Syud Fazul Hossein and others (Decree-holders), *Respondents.*

Moonshee Mahomed Yusuf for Appellants.

Mr. R. E. Twidale for Respondents.

A Court was held to have erred in making two different awards of costs in one and the same decree, which ought to have been drawn up in such a way as to direct the payment of the difference only by the one party to the other:

HELD, too, that the decree-holder could apply for execution of the difference only of the two amounts awarded.

Phear, J.—IT seems to us that the Court below was quite right. There has never been at any time a single day during which the present appellant was entitled to apply for execution of a larger sum than the difference between the two amounts of costs awarded, the one to him and the other to his opponent. Had the award of costs been made in separate suits on the same day, the words of section 209 of Act VIII. of 1859 would have been strictly applicable; and the moment after the latter of the two decrees was passed, only the difference, as we have said, would have been due under the decree to the party entitled to the larger sum. And obviously, as it seems to us, the same must be the case where the two awards have been made in one suit, as if the two awards had been made in different suits. The truth is that the Court itself erred when in one and in the same decree it made the two different money-awards. It ought to have drawn up

the decree in such a way as to have directed the payment of the difference only by the one party to the other. It is plain that this was the effect of the decree. It would be making the letter of the law of limitation practically a source of injustice if we yielded to the argument of the appellant before us.

The appeal must be dismissed with costs.

The 22nd February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Imperfect Decree—Act X. of 1859, s. 78—Execution—Wrong—Right of Suit.

Case No. 415 of 1872.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 17th November 1871, reversing a decision of the Moonsiff of Buxar, dated the 14th July 1871.

Dalmiah (Plaintiff), *Appellant,*

versus

Radha Pershad Singh (Defendant), *Respondent.*

Baboo Bungshee Dhur Sen for Appellant.

Baboos Romesh Chunder Mitter and *Doorga Mohun Doss* for Respondent.

The execution of an imperfect decree does not involve what is unlawful, or the doing of a wrong, unless the decree is incorrectly interpreted.

An action will lie in a Civil Court where a wrong is committed under color of a decree of another Court.

Phear, J.—In this suit the plaintiff complains of a wrong, which he says has been done him by the defendant under color of the decree which the defendant had obtained against him in the Collector's Court.

It seems that the wrongful act complained of was done deliberately by the direction of the Collector sitting as a Court executing the decree, and having jurisdiction to interpret the decree.

There is no doubt that the original decree of the Collector is a very imperfect one, and that it very little accords with the directions which are laid down for the drawing-up of decrees in section 78, Act X. of 1859. But we are unable to say that the Collector was wrong in the interpretation which he put upon the decree when he was called upon to execute it; and, consequently, we are unable to say that the act which the plaintiff complains was an unlawful act and a wrong done to him.

In this view, we think that the special appeal fails, and consequently it must be dismissed. But, at the same time, we do not desire to be understood to go the full length of the Judge's decision, *viz.*, that no action of this sort would lie in the Civil Court in the event of an obviously wrongful act having been committed against him under color of the decree of another Court.

The appeal is dismissed with costs.

The 24th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble E. G. Birch, *Judge.*

General Title—Mokurruree Tenure—Onus Probandi.

Case No. 697 of 1872.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 24th January 1872, affirming a decision of the Deputy Commissioner of Hazareebagh, dated the 16th August 1871.

Koonj Beharee Ram (Plaintiff), *Appellant,*

versus

Bukshee Luchmun Doss (Defendant), *Respondent.*

Baboo Tarucknath Dutt for Appellant.

No one for Respondent.

Where a plaintiff has the general title to the property in suit, and the defendant sets up an interest as mokurrureedar, the *onus probandi* is with the defendant.

Couch, C.J.—The Judicial Commissioner has confirmed the decree of the lower Court which was in favor of the defendant, solely on the ground that the plaintiff was bound to prove that the defendant's holding was not that of a mokurrureedar but under a limited lease, or that the defendant's tenure was not a valid one, before the defendant could be called on to defend his position.

In doing that, I think, he has fallen into an error in law. The plaintiff, it was admitted, had, if I may so express it, the general title to the property, and the defendant set up an interest as mokurrureedar; it was for the defendant to prove that, and not for the plaintiff to disprove it.

The first Court properly tried the question tween the parties, and came to the conclu- on that the defendant's title was as he alleged. e cannot consider what decision the Com- issioner might have come to if he had dealt th the case in the same way. The plaint- , the appellant before us, has a right to ve the opinion of the Commissioner upon e facts of the case, and the course which e Commissioner adopted of holding that e plaintiff was bound to disprove this leged title of the defendant, and that the fendant was not bound to prove it, has pre- nted the plaintiff from having that hearing the case before the Commissioner which was entitled to.

The decree of the Commissioner must be versed, and the case must be remanded to m for re-trial. The costs of the appeal will llow the result of the suit.

Birch, J.—I concur.

The 24th February 1873.

Present:

he Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

int Family—Suit by Co-sharers—Limitation—Hindoo Widow.

Case No. 223 of 1872.

pecial Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 30th September 1871, reversing a decision of the Moonsiff of Nasseer-nuggur, dated the 19th April 1870.

reemutty Bimola and another (Plaintiffs), *Appellants,*

versus

ngoo Kansaree and another (Defendants), *Respondents.*

Baboo Huree Mohun Chuckerbutty for Appellants.

boo Nullit Chunder Sen for Respondents.

Members of a joint family residing on joint premises entitled, on the occurrence of a dispute between m and their co-sharers, to come into Court, and ask have their proper share assigned. The fact of their having been in possession of a particular portion of e premises is no bar by way of limitation to a claim such portion.

There is no ground for the exclusion of a Hindoo dow from such claim, for, as the law now stands, she y re-marry and have issue.

Jackson, J.—It seems to me there was lly no valid defence to the plaintiff's suit. The plaintiffs did not sue to recover, as the Subordinate Judge supposes, a particular part of the premises in which Juggurnath, the father of Amrita and grandfather of the husband of Bimola, resided. They simply sought to establish their right to that portion of the joint-family premises which descended by right to Juggurnath. They put their claim a little too high in asking for a half share of those premises, when it seems they were really entitled to a fourth share, and no more. The Subordinate Judge taking a mistaken view of what, as I have just stated, the plaintiffs asked for, went on to say, that they had not been in possession of the particular premises of Juggurnath, and consequently their suit was barred by limitation. It is clear that they had been residing as members of a joint family on joint premises, and, on the occurrence of disputes between them and their co-sharers, they were certainly entitled to come into Court, and ask to have their proper share assigned.

As to the exclusion of Amrita under the Hindoo law, there seems to be no ground for that, because, although a widow at the time of her father's death, still she could certainly, as the law now stands, re-marry and have issue. I think the decision of the Lower Appellate Court should be set aside, and the Moonsiff's decree for a fourth share restored with costs.

Glover, J.—I concur.

The 24th February 1873.

Present:

The Hon'ble A. G. Macpherson, *Judge.*

Reviews—Ground of Application—Act VIII. of 1859, s. 376.

*Application for review of judgment passed by the Hon'ble Justices W. S. Seton-Karr and A. G. Macpherson, on the 3rd February 1866, in Regular Appeal No. 318 of 1865.**

Jadub Ram Deb, Plaintiff (Appellant), *Petitioner,*

versus

Ram Lochun Mudduck and others, Defendants (Respondents), *Opposite Party.*

Mr. J. T. Woodroffe and *Baboo Kumla Kant Sen* for Petitioner.

No one for Opposite Party.

* 5 W. R., *Civil*, 56.

A review cannot be granted on the ground that, if the facts had been better or more fully placed before the Court, the judgment would have been different, or even on the ground of a subsequent decision of a question of law by the Privy Council in another suit where there has been no discovery of new evidence such as is contemplated in Act VIII. of 1859, s. 376.

Macpherson, J.—I REJECT this application. The petition (which seems to have been presented in Court in March last) prays for a review of a judgment passed by Mr. Justice Seton-Karr and myself on the 3rd of February 1866, more than seven years ago. But it discloses absolutely no ground upon which a review could be granted. Read along with an affidavit of Sooknath Doss Chowdhry, one of the petitioners, affirmed on the 11th of March 1872, it makes no more of a case than this: That, in the beginning of November 1871, Sooknath became aware that, on the 12th of December 1870, Bayley and Mitter, JJ., gave a decision (in special appeal 875 of 1870), the result of which is that other persons whose position was precisely similar to that of the petitioners, except that the parcels of land claimed were different, have been successful in their suit, whereas the petitioners themselves were unsuccessful.

Mr. Woodroffe, on the 25th of January last, appeared in support of the application, and urged an additional ground, *viz.*, that recently, and since the petition was prepared and presented, the Privy Council have delivered a judgment in another suit, which shows that our decision of the 3rd of February 1866, as to the effect of section 36 of Act XI. of 1859, was wrong.

It may be that, if the facts had been better or more fully placed before us than they were, or if the judgment of the Privy Council had been delivered in 1865 instead of 1872, the conclusion arrived at by us would have been different. But litigation would be interminable if reviews would be obtained on such grounds as these. There is no pretence for saying that there has been any discovery of new evidence such as is contemplated in section 376 of Act VIII. of 1859; and it has been ruled by this Court repeatedly, that a subsequent decision of a question of law by the Privy Council in another suit, is not a ground on which a review can be granted. Moreover, the delay which has occurred in making this application is of itself a sufficient reason (under section 377) for rejecting it.

The 24th February 1873.

Present:

The Hon'ble Louis S. Jackson and F. Glover, *Judges.*

Over-statement of Claim—Estoppel.

Case No. 240 of 1872.

Special Appeal from a decision passed the Additional Judge of Chittago dated the 20th September 1871, aff ing a decision of the Officiating A tional Moonsiff of Putteah, dated the April 1871.

Pitambur Dey (Plaintiff), *Appellant,*

versus

Gooroo Doss Lalla and others (Defenda *Respondents.*

Baboo Aukhil Chunder Sen for Appella

Baboo Motee Lall Mookerjee for Respondents.

In a suit upon a *kobala* from a member of a undivided family, the mere fact of plaintiff having stated the extent of his interest was held to be no to his recovering from a third party that portion really was his vendor's interest.

Jackson, J.—IN this case, the decisio the Lower Appellate Court is based ch on a ground which it seems to us canno supported. The plaintiff sued upon a ko from one Eshan, who was a member of a undivided family. This kobala purpo to convey to plaintiff an eight-anna s of the family-property. The Judge obse that the kobala professes to deal with share of Eshan himself and of Ram Se his cousin, but that the two united sh would not amount to eight annas, nor wa share of Ram Sebuk such as Eshan had power to convey. He says that the d ment was so inaccurate in its statemen the vendor's right, that it could not be sidered as having any validity. This p taken by itself, appears to us to be untens The plaintiff might have various motive misdescribing or over-stating the exte his interests, but the mere fact of his ha so over-stated it is no bar to plaintiff reco ing from a third party that portion w really was his vendor's interest. The must go back to the Lower Appellate C to determine whether Eshan really conv to the plaintiff; and, if so, what was th tent of his interests; and if the defenda in possession of that share, and there other valid reason for dismissing the the plaintiff would be entitled to a d accordingly.

The 20th December 1872.

Present:

The Hon'ble W. Markby, *Judge.*

eal to Privy Council—Valuation—Onus Probandi—Charter s. 39.

In the Matter of

Rajah Reedhnath Sahee, *Petitioner,*

versus

pee Sahoo and others, *Opposite Party.*

Mr. R. E. Twidale for Petitioner.

aboos Anund Chunder Ghosal and *Abi- Chunder Banerjee* for Opposite Party.

establish a right of appeal to the Privy Council in e which, up to the time when the party comes to igh Court, has been treated as one involving a smaller amount than the sum now stated, it is for arty to show that the sum is such as he states it

e High Court refused, under s. 39 of the Charter, n so wide a door to appeal as to allow it in a case ing less than Rs. 10,000 only, because the whole pty which would be reduced in value in the event appeal proving successful, was worth not less Rs. 10,000.

arkby, J.—THIS was a case in which property in suit was valued at Rs. 0. The first Court dismissed the suit. second Court gave plaintiff a decree. decree was ultimately affirmed by this t in special appeal. The defendant now es to be allowed to appeal to the Privy cil on two grounds: *first*, that the pro- is really of the value of Rs. 10,000; *secondly*, that, even if the Court should opinion that the property is not of that , nevertheless the case comes under the section of the Charter which makes a appealable, if the decree involves direct- indirectly some question respecting pro- of the value of not less than Rs. 0. The property which the plaintiff to recover is one-fifth of a village called ree, two-fifths of village Goorjawan, and fth of village Sereah. The suit was nenced in 1867 in the Court of the cipal Sudder Ameen, a Court of unlimit- urisdiction as regards the value of the erty, and the Act which regulated the tion of suits for the purpose of paying to Government then in force was Act . of 1862. If the defendant had suc- ed in establishing his allegation that the erty is, in reality, of the value of Rs. 00, I should have to consider the same tion as was considered by me in the peti- of Lekraj Roy and others, decided on the 21st September 1872, and which was also considered by Mr. Justice L. S. Jackson in the case reported in Weekly Reporter, Volume XIV., page 62, and referred to in that judgment. I should also have to consider the exact effect of the decision in 10 Moore, page 321, although in consequence of the original Court in that case being a Court of limited jurisdiction as to value, the two cases are not precisely similar, and these questions were, in fact, argued on this rule; but I do not think it necessary to express any opinion on them, because, upon the affidavit, I do not consider that the case has been shown to be appealable to the Privy Council in point of value, if value is a question, which, having regard to those decisions, I am now at liberty to inquire into. The only affidavit of the appellant is that of two persons, who simply state their knowledge of the collections amounting on an average to a sum ranging between Rs. 2,500 and Rs. 2,800. Now, as I have already said, there are three villages involved, and the plaintiff seeks to recover one-fifth of each of two villages, and two-fifths of the third. There is an infinite variety of ways in which the annual income may be apportioned between the three villages, and no doubt it is possible so to apportion that income that the amount may come up to the value of Rs. 10,000. If the income of the village Goorjawan is very much larger than that of the other two villages, no doubt that might be so; but I think as the petitioner comes here to establish his right to appeal to the Privy Council in a case which has been, up to this point, at any rate, treated as one involving a much smaller amount than the sum stated, it is for him to show th at the amount is such as he states it to be. I think the mere statement that the income of the three villages put together ranges between Rs. 2,500 and Rs. 2,800 is not sufficient. If it should be the case that all portions of the property are equally assessed, then as the plaintiff only claims four-fifteenths, the annual income of the property which he claims would only amount to something between Rs. 600 and Rs. 800 a year, and according to ordinary rules, the value of the property in this suit would not thus amount to Rs. 10,000, even supposing that such a calculation as this could be made. I think the petitioner has failed to show that the property involved in this suit is of the value of Rs. 10,000.

On the other question, *viz.*, that the suit involves some question which directly or indirectly relates to a property of the value

of Rs. 10,000, I think the result is the same. The way I am asked to look at the matter is this. The whole zemindaree is stated to be worth a great deal more than Rs. 10,000, which no doubt is true; and if the plaintiff recovers the share which he claims out of these three villages within the zemindaree, it is said that the value of the whole property will be reduced, and, therefore, the question raised in this suit affects the whole zemindaree. I have already said in a case somewhat of the same kind, that I do not think that, under section 39 of the Charter, we ought to open such a very wide door to appeal as this. It is nowhere alleged in any statements before me, that the value of the zemindaree would be decreased to the extent of Rs. 10,000. I think, therefore, that this ground also fails.

I think that, even if the defendant under the decisions referred to is not stopped from going into the question of value, he nevertheless has failed upon the merits of the application, which ought therefore to be dismissed.

The rule is discharged with costs.

The 11th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Act XIV. of 1859, s. 1, cl. 13—Suit for Share of Joint Family-property—Limitation—Onus Porbandi.

Case No. 733 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 9th February 1872, reversing a decision of the Moonsiff of Bancoorah, dated the 8th May 1871.

Gossain Doss Koondoo and others (Defendants), *Appellants*,

versus

Seroo Koomaree Debia (Plaintiff), *Respondent*.

Baboo Bungshee Dhur Sen for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

Under Act XIV. of 1859, s. 1, cl. 13, a suit to enforce the right to a share of joint family-property must be brought within twelve years of the last payment to plaintiff on account of the share, or twelve years from the time of the plaintiff's being in possession of his share.

Where limitation is set up, the *onus* is on the plaintiff to show that he has had possession of the share, or received payments on account of it, within twelve years from the institution of the suit.

Couch, C.J.—This was a suit for possession of a share of a tank including the bank and the trees growing thereon, and one of the issues recorded was, whether the suit was barred by the law of limitation.

The Moonsiff in his judgment, after commenting on the evidence in the case, says: "The "it being clear from the evidence of plaintiff "witnesses that Hulodhur" (whose share the plaintiffs claimed as having purchased it at a sale in execution of a decree against him) "had no possession of the tank within twelve "years, and that the defendants had been "along in such possession, the suit is fully "barred by the law of limitation. I cannot "but think that the plaintiff's claim is entirely groundless, and out of time, and, therefore, it is needless to enter into the merits "of the case. Consequently I dismiss the "suit with costs."

There was then an appeal which was heard by the Judge, and he, after stating the judgment of the Moonsiff and the grounds of appeal, says: "There is no proof of the "possession of Hulodhur nor of his widow. "Hulodhur died ten years ago. Appellant's "pleader argues that the presumption is that "the seven sons were in joint possession "and the presence of one of them is the "presence of them all, and defendants must "rebut this presumption * * *. As long "as the family remains joint, the possession "of one member is the possession of all. "and this plaintiff was given formal possession of by the Court, and limitation cannot "arise. The party alleging that two of the "seven sons resigned their share in this tank "in consideration of another tank must "prove this." He sums up his judgment by saying: "I am of opinion that the possession of the seven brothers was joint. "There is no reliable proof of a separation "of the brothers, and the presumption "amounts to proof that the property was "held jointly by the seven brothers. The "Moonsiff has, I think, thrown the onus "*probandi* on the wrong party, and not considered the overwhelming presumption "Hulodhur's possession of a seventh share "in the tank." He then decreed in favour of the plaintiff, and reversed the judgment of the Moonsiff.

The question being whether a suit for a share of one of seven brothers in a tank was barred by the law of limitation, the Judge has held that it was sufficient for the plain-

claimed the share to show that Hulodhur e share she claimed was one of seven bers, being a joint family, and that the mption that possession of one of them the possession of all was sufficient to the burden of proof upon the defend- who set up the law of limitation.

appears that there have been conflict- dicta, if not decisions, in this Court this matter. In the second edition of Thomson's work on the Law of Limita- published in 1870, most of the decisions e that time are noticed. There is the m of the late Chief Justice and Mr. ce Louis Jackson in Ooma Soonduree e *vs.* Dwarkanath Roy.* At page Sir Barnes Peacock, who delivered the ent of the Court, says: "The Judge robably wrong as regards the second e in throwing the *onus* upon the de- dants, for the plaintiff alleged that his e of action accrued in Aughran 1266, n the brothers separated in mess; and ppears to us that the *onus* lay upon the ntiff (even if the property claimed by defendants as separate was really joint) how that he had participated within e years in the rents and profits of those es, and that they had been brought into t account."

Thomson refers to other cases in the same opinion has been expressed. hink that, in this conflict of authority Court, we must see what the language use 13, section 1 of Act XIV. of 1859, provides that: "To suits to enforce the t to share in any property, moveable mmoveable, on the ground that it is joint ly-property, the period of twelve years the death of the persons from whom property alleged to be joint is said to descended, or from the date of the payment to the plaintiff, or any person gh whom he claims, by the person e possession or management of such erty or estate on account of such ed share," shall be applicable.

have read the part of the clause applies to a share in joint family- rty; we need not notice that which for the recovery of maintenance.

s clause is clearly intended to apply to of joint family-property, and it says tly that, although it is a joint family- rty, the suit to enforce the right to a in it must be brought within twelve from the date of the last payment to the plaintiff on account of the share. If the law laid down by the Judge were correct, that in such a case it is sufficient for the plaintiff to show that the property is joint family-property, this provision in clause 13 would be practically inoperative, because all that the plaintiff need show is that it is joint family-property. But the clause says that the action must be brought twelve years from the date of the last payment on account of the share, plainly showing that, for the plaintiff to be entitled to sue, there must be something more than the fact of the property being joint, and the possession of one being therefore the possession of all. We do not see how effect can be given to this provision of the law without holding that the suit must be brought within twelve years from the date of the last payment on account of the share, where one person is in possession or management of the property, or twelve years from the time of the plaintiff's being in possession of his share, for we agree that it was not intended to bar the plaintiff's right of action where he had been in possession of his share in any way within twelve years. If he is in possession of his share, there can be no payment to him by another person on account of his share. The language of the section clearly shows that it was not intended to prevent the plaintiff from bringing his suit where he had been in possession within twelve years.

But then comes the question, on which party is the *onus* of showing possession or not of the share within twelve years, or receipt or not of a payment from the person in the possession or management of the property within twelve years.

We think that, in deciding upon which party the burden of proof is under this section, we must be guided by what has been held in cases under clause 12. In those it has been settled that the plaintiff must show that he or some one through whom he claims has had possession within twelve years before the suit. If he sues for the recovery of immoveable property on the ground of having been dispossessed from it, he must show that he has come within twelve years from the time when his cause of action arose—the time when he was dispossessed. It is not enough for him to prove his title to the property which is the subject of the suit, and leave it to the defendant to show that the suit is barred by the law of limitation by proving when the plaintiff was last in possession. It has been considered, looking at the way in which the law of limitation is

* 11 W. R. 73.

framed, that the plaintiff is bound to give evidence of that kind.

If we apply that rule to clause 13, it will be incumbent on the plaintiff to show that it is a suit not barred by the law of limitation; that he has had possession of the share within twelve years, or received payments on account of it within that time.

Therefore, the decision of the Judge, that the burden of proof was not on the plaintiff but on the defendant, is wrong, and must be reversed, and the case must be remanded to him for re-trial.

The 12th February 1873.

Present:

Lord Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Right to Light—Obstruction—User—Agents—Constructive Knowledge.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Elliott and others

versus

Bhoobun Mohun Bannerjee.

In a suit for an injunction to restrain defendants from proceeding with a building, and to have a portion of it taken down, which had the effect of obstructing light to which plaintiffs were entitled through their windows (the English law before the passing of the Prescription Act, 2nd & 3rd William IV., c. 71, being applicable, and plaintiffs being required to show an uninterrupted user of at least 20 years, with the acquiescence of the defendants):

HELD that, as the building was commenced, and commenced with the manifest intention of being erected as an obstruction before the expiration of the 20 years, the plaintiffs had not established their case.

Quære.—Is not knowledge on the part of an agent who collects rent for the owner, and is entrusted with the authority of fixing the amount, constructive knowledge on the part of the owner sufficient to satisfy the exigence of proof on the part of the plaintiffs in such a case?

THIS was a suit for an injunction praying that the defendants might be restrained from proceeding with a certain building, and that a portion of it might be taken down, which had the effect of obstructing light which the plaintiffs alleged they were entitled to have through their windows. It would appear that the windows in respect to which the right to the light is claimed were so far c pleted on the 14th April 1850, that the o of the right would then accrue. That is finding of Mr. Justice Norman, the Judg first instance, a finding in which their L ships concur.

The suit was commenced on the 18 May 1870, rather more than a month be the expiration of 20 years from the fo date of April 14th, 1850.

It is admitted that the Prescription the 2nd & 3rd William IV., c. 71, does apply, and that we must have resort to English law which prevailed before its ing. So far as this would seem to be that the plaintiffs, in order to establish title, would have to show an uninterr user of at least 20 years, with the acq cence of the defendant, the owner of servient tenement. But some questio nicety have been raised as to what wou would not amount to acquiescence, a was discussed whether actual knowledge necessary to be shown on the part of defendants. That proof of such a knowledge was necessary appears to been the view of the Court above, w reversed the decision of Mr. Justice Nor the Judge of first instance, and found, fact, that actual knowledge was not s to have existed on the part of the de ants. If the decision of the case rested this point, their Lordships would have de to hear further argument, because they by no means satisfied that knowledge o part of the agent, who acted for the r the owner of the property in 1850 (whom the defendants purchased), who lected his rents, and, further, was entr with the authority of fixing their amo would not be constructive knowledge o part of the rajah sufficient to satisfy exigence of proof on the part of the pl iffs.

Another question arose in the case whether the fact of the premises being l tenants at, as it would appear, a monthly on the commencement of the accrui this right, namely, in 1850, would have any bearing upon the rights of the par But their Lordships do not think it nece to enter into a discussion of these questi because they have come to the conclus independently of them, that the plain have not established an uninterrupted us these lights for the space of 20 years, the acquiescence of the defendants. must be taken that the enjoyment comme on the 14th April 1850. It would ap

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* From the judgments of Couch, C.J., and Markby, J., sitting on appeals from ordinary original civil jurisdiction—6 B. L. R. 85.

t, in March 1870, the plaintiffs received notice from the defendants, or, at all nts, they were informed by the defendants it was their intention to erect a building 24 feet or more in height on the north of premises of the building in question, ch would have the effect undoubtedly of ructing their lights. It appears that building was actually commenced on the d March 1870, and its construction was tinued. It is true that it was not raised uch a height as to actually amount to an ruction until some days after the 20 s had elapsed; but it was commenced, commenced with the manifest intention eing erected as an obstruction before the ration of the 20 years.

Under these circumstances, it appears to r Lordships that it is quite impossible to ume enjoyment for 20 years with the acscence of the owner of the servient tenent, when before the expiration of those years, the owner not merely gave notice his intention to interfere with that enjoyt, and to raise an obstruction, but in purce of that notice actually commenced erection of that obstruction which was pleted a few days after the expiration of time in question.

Under these circumstances their Lordships e come to the conclusion that there was an enjoyment for 20 years on the part of plaintiffs with the acquiescence of the ndant such as to entitle them to main this suit.

Their Lordships will therefore humbly ad Her Majesty that the judgment of the pellate Court, the High Court of Cal a, be affirmed, and this appeal dismissed costs.

The 25th February 1873.

Present:

Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

nts (Form and Substance)—Decree—Appellate Courts.

Case No. 732 of 1872.

cial Appeal from a decision passed by the Officiating Additional Subordinate Judge of Dacca, dated the 7th February 1872, reversing a decision of the Moonsiff of Naraingunge, dated the 7th July 1871.

Raj Kishore Bhuddur (Plaintiff), *Appellant*,

versus

Huree Mohun Bhuddur and others (Defendants), *Respondents*.

Baboo Sreenath Banerjee for Appellant.

Baboo Bungshee Dhur Sen for Respondents.

In a suit to recover possession of a third part of a *khanabaree*, where the first Court, considering that there never had been a partition in definite shares, ordered restoration to the sort of possession plaintiff had enjoyed previous to being dispossessed:

HELD that there was no objection to the decree being in that form; and, although a plaintiff does not prove the precise claim which he makes, if he is substantially right, he ought to have a decree, and not be left to bring another suit:

HELD that the fact of a Court of first instance having made an improper decree is a ground not for the Appellate Court to dismiss the suit, but to make a proper decree.

Couch, C.J.—THE suit was brought for a third part of a *khanabaree*, and the Moonsiff found that the plaintiff had proved that he was in possession of the 5 annas, 6 gundas, 2 kerras, and 2 krantees' share. Then he goes on to say: "Plaintiff must be entitled "to recover possession of the said 5-6-2-2 "share of land in respect of the *khana*-"*baree* as before.

"Finally, it is necessary to observe that, "from the statements and evidence of both the "parties, it appears that the said *baree* was "never partitioned in definite shares. They "have divided the *baree* into *dehees* for "their respective convenience. Plaintiff shall "obtain possession of the western *dehee* as "he held before his dispossession."

What he appears to have done is, not to have awarded possession of the share as if there had been an actual partition, as he considered there had never been a partition in definite shares, but to have ordered the plaintiff to be restored to the sort of possession he had before, and which was taken from him. When the case was heard on appeal, the Subordinate Judge said: "The Moon-"siff has given a decree for a distinct portion "of the land to the plaintiffs, forgetting that "that was not the remedy sought by them." He is mistaken there; for the Moonsiff did not give a decree for a distinct portion of the land as if there had actually been a partition. The Subordinate Judge has rather misunderstood that part of the Moonsiff's decree.

Then he said: "This mode of proceeding is quite illegal, and following the precedent published in page 248, Weekly Reporter, Volume XII., I decree the appeal with costs." We think he was wholly wrong here. If the

plaintiff established his right to the share which he claimed, we do not see any objection to giving him a decree for it, nor, if it appeared that there had been a partition, to giving him a decree for the part which he had become entitled to by it. The substance of his claim is the same; it is for a third share.

We do not agree in the very general proposition laid down in the case in 12 Weekly Reporter. There are many cases in which a plaintiff is entitled to a decree, although he does not prove the precise claim which he makes in his plaint. What is to be looked at is the substance of his claim, and if he shows that he is substantially right, we think he ought to have a decree, and not be left to bring another suit. Here the Judge is further wrong; because, supposing he is correct in thinking that the Moonsiff had made an improper decree, it would not be a ground for dismissing the suit. What the Judge ought to have done was to hear the appeal, and make a proper decree.

The case must be remanded to the Lower Appellate Court to be re-tried.

The 25th February 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of Rent—Limitation—Registration—Grounds of Review.

Application for review of judgment passed by the Hon'ble Justices Kemp and Glover, on the 4th December 1872, in Special Appeal No. 675 of 1872.

Ram Chunder Chowdhry, Defendant (Respondent), *Petitioner,*

versus

Hurish Chunder Chowdhry, Plaintiff (Appellant), *Opposite Party.*

Baboo Kishen Dyal Roy for Petitioner.

No one for Opposite Party.

A landlord is at liberty to bring his suit for enhancement of rent whenever it pleases him to do so; it is for the tenant to prove his right to hold at a fixed rate if he can.

The plea that registration protected a tenure was not admitted as a ground for review when it had not been urged at the original hearing or in the lower Courts, and where the title so registered was found to have been procured fraudulently.

* 18 W. R. 528.

Glover, J.—The first ground of applica tion is that the plaintiff not having brou a suit within 12 years to cancel the mok ruree title is now prevented from getting t of it; the second, that the Court did not co sider the effect of the registration und Act XI. of 1859; the third, that the s ought to have been remanded to find th correct rate of rent and the quality a quantity of the land.

The first objection is clearly untenab The plaintiff as landlord was entitled t bring his suit for enhancement whenever pleased him to do so, and it was for the t ant to prove his right to hold at a fixed r if he could. The longer he had held at fixed rate of rent, the easier it would be him to get the benefit of the presumpt arising of a 20 years' uninterrupted p ment at the same rate, but the landlo right to *bring* a suit for enhancement wo not be affected by an alleged mokurr possession on the part of the tenant for years.

The question of registration was not pres upon us at the original hearing, and on tu ing to the Moonsiff's judgment, we find t no such objection was taken by the defe ant before him, neither did the defend make it one of his grounds of appeal to t Subordinate Judge. The Subordinate Ju found it necessary to take additional eviden and seems to have gone very carefully i all the points at issue between the parti raising and determining no less than ei issues. But the objection now taken, t the registration protected the tenure, ne seems to have been put forward at any ti and, under the circumstances of this case, are not inclined to take it up now, it ha been found as a fact that the title so re tered had been procured fraudulently a time when the property was under att ment, and when the owner of the estate no right to grant tenures of any kind, holder of the tenure so created being his o son, and the arrangement being one most p pably in fraud of creditors.

The third objection is, we think, dispo of by the fact that a local inquiry was ma and both quantity and quality of land fi We have already decided that the defenda not entitled to anything more than a rig occupancy, and, on this understanding of status, the finding of the Moonsiff as to the payable by him is sufficient and satisfact In fact, this objection seems to be brou merely with the view of re-opening the qu tion as to whether there is or is not, accordi

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to the rent-law, a class of persons between tenure-holders and ryots. We have already said that no such class is mentioned in Act X of 1859.

The application must be rejected.

The 25th February 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Attachment—Sale pendente lite—Right of suit.

Case No. 486 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 31st August 1871, affirming a decision of the Subordinate Judge of that District, dated the 20th February 1871.

Maharanee Indurjeet Kooer (Defendant), *Appellant,*

versus

Mussamut Pootee Begum (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Moonshee Mahomed Yusuf* for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

P IR having obtained a decree against the heirs of A attached certain property in execution. P, one of the heirs, objected that the decree was made against the defendants in their representative capacity, and that the property attached had descended to her not from A, but from her husband. The objection was overruled, and the property sold. P appealed to the High Court, who passed a judgment in her favor.

HELD that the sale of the property was one *pendente lite,* and as such, subject to the final result of the suit between the parties, and that P had a right to come into Court as agains tthe purchaser, and establish her title to the property.

Phear, J.—IT seems to us that the Courts below are substantially right in this case.

Maharanee Indurjeet Kooer had obtained a decree against the heirs of Kazee Hossein Ali Khan, and attached certain property with the view of having it sold in execution of that decree. Mussamut Pootee Begum, one of the heirs, and a defendant in that suit, objected to the attached property being sold on the ground that the decree was made against the defendants in their representative capacity, and could only be executed against the property which had descended to them from Kazee Hossein Ali Khan; whereas the property which had been attached was her own property come to her from her husband.

The Court which was charged with the execution of the decree overruled this objection, and ordered the property to be sold. But Mussamut Pootee Begum appealed against this order to the High Court; and the High Court passed a judgment in her favor, which contains the following passage, as Mr. Justice Macpherson states it in the case reported in Volume XII., Weekly Reporter, page 201: "We remanded the case "to the lower Court, saying that Pootee "Begum was entitled 'to have the question "determined whether the property now "seized in execution came to her from her "father or from her husband.' We added: "'If she received it from her husband, it can-"not, under the terms of the decree, be sold "in execution, as that decree is against her "as one of the representatives of her father, "and the execution of that decree is limited "to property of the father found in the hands "of the representatives.'"

That is a distinct decision of this Court upon appeal to the effect that the decree which Maharanee Indurjeet Kooer had obtained, was a decree the execution of which was limited to the property of her father found in the hands of the representatives, and could not be put in operation against the property of the defendant herself.

It seems that, at the time this decree of the High Court in that matter was passed, the sale in execution of the property had actually been effected, and the plaintiff herself had bought the property.

Now it appears to us that the moment the objection of the defendant to this property being sold in execution of the decree was made, and the Court, under the provisions of section 11, Act XXIII. of 1861, entertained that objection judicially, the original suit between the parties, whatever its former purpose, was turned into a suit directed immediately to this land itself. This very land was at that stage the matter in suit between the parties; and while that was so, the sale was effected, and Ranee Indurjeet Kooer purchased. To our mind, even had she been a stranger, instead of being also a party to the suit as she was, the purchase made by her under these circumstances would have been a purchase of property *pendente lite,* and as such, of course subject to the final result of the suit between the parties. The case is, we think, entirely different from the ordinary case of the sale of

the property of a judgment-debtor made in execution of a decree which is the subject of appeal to a higher Court under circumstances such that the appeal-proceedings do not have the effect of staying execution of the decree appealed against. In a case of that kind, no doubt, the sale in execution may effect a good and valid transfer of property to a purchaser for valuable consideration, even though the decree in execution of which it was made be subsequently reversed; for this simple reason, namely, that at the stage of the proceedings when the sale was made, the decree was a valid decree, and the Court had authority at law to sell the judgment-debtor's property in execution of that decree. But here the very matter in litigation between the parties to the suit at the time when the sale was made, was the right of the Court to sell this property. The highest Court of appeal afterwards determined that the Court, executing the decree, had no right or authority to sell and convey this property, supposing it to be the property of the defendant by any other title than that of inheritance from her father. We must say that the inclination of our opinion is that the High Court might, under the circumstances of the case, having gone on, even although the sale had been effected, to make the inquiries of fact which were directed to be made, namely, the inquiry whether the property was originally the property of the father, Kazee Hossein Ali Khan, and from him descended to Pootee Begum, or not; and that it might, upon this issue being determined in favor of Pootee Begum, have set aside the sale as against the plaintiff Maharanee Indurjeet Kooer, who had become the purchaser. We are not prepared even to say that, if the purchaser had been an entire stranger, he might not, under the circumstances mentioned, have been put upon the record, in as much as in the view we have taken, he would have been the purchaser *pendente lite*, and therefore one who had placed himself in the shoes of the litigant party. But, however this may be, it appears to us clear that the party to the suit who had a decision of the highest Court in her favor to the effect that her property, if it had not come to her from her father, could not lawfully be taken and sold in execution of the decree, has an undoubted right to come into the Civil Court as against the purchaser, whoever that purchaser may be, to establish her right and title to the property which has so been unlawfully conveyed away from her. It seems to us that it would certainly be a great slur upon our procedure if this were otherwise.

Pootee Begum has brought this suit against Ranee Indurjeet Kooer in her capacity of purchaser; and it appears to us a very poor answer indeed to that suit to say—this question has already been tried between you and me in the execution-proceedings, and has been determined in your favor, only that the last step was not taken, namely, the step of giving effect to the final decision of the Court, because the Court held its hand.

In this suit, as we understand, the Courts below are unanimous in finding that the property which the plaintiff's execution-creditor bought at the execution-sale was the property of Pootee Begum come to her from her husband, and not from her father. That being so, it follows from the decision which this Court gave in February 1867, that the sale was not a lawful sale, and did not pass the right and title in the property to the purchaser. We think, therefore, that the Courts below were correct in the view which they have both taken of the plaintiff's rights, namely, that the plaintiff in this suit is entitled to recover, and we are of opinion that this appeal should be dismissed with costs.

The 25th February 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Registration—Act XX. of 1866, s. 36—Suit against sold-out Tenant—Execution-sale.

Case No. 241 of 1872.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 9th October 1871, reversing a decision of the Moonsiff of Raojan, dated the 9th May 1871.

Magon Mallo (Plaintiff), *Appellant,*

versus

Doola Gazee Koolan and another (Defendants), *Respondents.*

Baboos Huree Mohun Chuckerbutty and *Aukhil Chunder Sen* for Appellant.

Baboo Bungshee Dhur Sen for Respondents.

Plaintiff, having purchased at an execution-sale the right, title, and interest of a tenant in an istemeari jote, obtained from the zemindar a pottah which he sought to register according to law. The zemindar appeared at the registration office, and admitted the execution of the pottah, but did not assent to its being registered, whereupon the registering officer withheld registration. Afterwards the zemindar sued the sold-out tenant for arrears of rent, obtained an *ex-parte* decree, and in execution sold and bought the tenure. He was then put in possession notwithstanding the protest of the plaintiff, who now sues to be restored to possession:

HELD that it was the duty of the registering officer to register the pottah, notwithstanding the executant's refusal of consent:

HELD that the zemindar took nothing by his purchase, and was bound to give way to a *bonâ-fide* purchaser.

Jackson, J.—THE decision of the Lower Appellate Court in this case indicates an entire inability to grasp the real facts and questions arising upon those facts as they ought to have been grasped. The plaintiff purchased an istemiarr jote, that is to say, the right, title, and interest of the tenant therein, in August 1866, at a sale in execution of a Civil Court decree. This is unquestionable. It is also alleged, and there appears to be really no reason to doubt, that, in pursuance of that purchase, the plaintiff went to the zemindar, and received from him a pottah, which pottah the plaintiff sought to register according to law. The zemindar appeared in the registry office, and there admitted the execution of the pottah, but did not assent to its being registered, whereupon the registering officer (why we do not know) withheld registration. Under section 36 of the Registration Act, it appears to us that, on the registering officer inquiring whether or not the document was executed by the person by whom it purports to have been executed, if such person admits the execution of the document, the plain duty of the registering officer is to register the document whether the executant asks or consents to it or not. The plaintiff, no doubt, if well advised, ought to have made proper application to enforce registration, but he did not. After this the zemindar brought a suit for arrears of rent against the tenant who had been sold-out, which suit was undefended; a decree was passed, the tenure was put up to sale, and purchased by the zemindar himself for two rupees. The zemindar then applied to the Collector to put him in possession, which was done notwithstanding the protest of the plaintiff. The plaintiff, therefore, brings this suit to be restored to possession.

The Court of first instance found that the zemindar's conduct was tainted with fraud, and gave plaintiff a decree. That decree has been reversed by the Additional Judge upon very insufficient reasons. The Judge says: "The plaintiff's pottah is inadmissible "as evidence, and I cannot but think that "probability lies on the side of want of "genuineness in the dakhilas. I am cer-"tainly unable to determine that plaintiff "has since, his auction-purchase in 1866, paid "rent to the zemindar defendant. The "landlord not getting his rents, had a right "to look to the occupier of his land and to "the land itself as his security, and the "plaintiff, when his pottah was refused regis-"tration, had his full opportunity to have "that registration enforced if it was his "right."

The Judge altogether overlooks the fact that the zemindar well knew that plaintiff had acquired the tenure by purchase. Notwithstanding that knowledge, three years afterwards, he brought a suit for arrears of rent against a person whose interests he knew had become extinguished, and obtained the sale of the tenure on the strength of an *ex-parte* decree against such person. If it were necessary to decide the case on that point alone, it would be sufficient to say that the zemindar by such subsequent purchase in execution of a decree against a sold-out tenant had taken nothing, and was bound to give way to a *bonâ-fide* purchaser like the plaintiff. More than that, under the circumstances of the case it is quite clear that the conduct of the zemindar is tainted with fraud. He is made aware of the plaintiff's purchase; he actually executes a pottah in plaintiff's favour, goes to the Registrar's office to register the document, and there declines to register it. He then tries to avoid his own act, and ignoring the plaintiff brings a suit against a party whose rights he knows to be non-existent. Under such circumstances, if the sale under the rent-decree had any validity, and could prevail over the previous purchase made by plaintiff, it would have been the duty of the Court to order the zemindar to re-convey the tenure to the plaintiff, but as we have already stated that is unnecessary as the zemindar took nothing by his purchase. The judgment of the Lower Appellate Court is overruled, and that of the first Court is restored with all costs.

The 26th February 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII. (B. C.) of 1869, s. 102—Subordinate Judge.

Case No. 301 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 15th September 1871, reversing a decision of the Moonsiff of Begumgunge, dated the 15th December 1870.

Mahomed Munoor Mean (Plaintiff), *Appellant,*

versus

Sreemutty Jybunee and another (Defendants), *Respondents.*

Baboo Oomesh Chunder Banerjee for Appellant.

Baboo Sreenath Banerjee for Respondents.

Act VIII. (B. C.) of 1869, s. 120, relates only to suits decided by the District Judge, not to those tried by the Subordinate Judge.

Jackson, J.—THE respondent in this case preferred a preliminary objection that the appeal is taken away by section 102 of Act VIII. (B. C.) of 1869. That section only relates to suits tried and decided originally or in appeal by the District Judge.

The present case had been tried and decided not by the District Judge, but by the Subordinate Judge. The objection taken therefore failed.

As to the appeal we think that it should be dismissed with costs.

The 26th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

Act X. of 1859—Rights of Occupancy—Tanks.

Case No. 712 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 31st January 1872, reversing a decision of the Moonsiff of Bishenpore, dated the 5th May 1871.

Siboo Jelya (one of the Defendants), *Appellant,*

versus

Gopal Chunder Chowdhry and another (Plaintiffs), *Respondents.*

Baboo Nil Madhub Sen for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

The provisions of Act X. of 1859, which confer a ri of occupancy, do not apply to a tank used only for preservation and rearing of fish, and not forming a p of any grant of land or an appurtenance to any la even though possession may have been held for m than twelve years.

Couch, C.J.—THIS suit was brought the possession of a tank which the plai alleged he had been dispossessed of. case was that he had purchased the tank sale in execution of a decree against Ra Gopal Singh to whom it belonged as a re free tenure.

Siboo Jelya was allowed to come into suit as a defendant in the suit, and he not deny that the property in the ta belonged to Rajah Gopal Singh, and tha had been purchased by the plaintiff, but objected that the Rajah had no khas p session; that on the 4th of Joisto 1230, gave a lease of the tank to this defenda father, and that the property had since b held accordingly; and that under that le the plaintiff's were not entitled to khas p session.

The issue framed by the Moonsiff whether Siboo Jelya entered into possess of the tank as ancestral *jummai* property, the judgment-debtor had khas possession the same; and in his judgment he sa "Upon the evidence on the record and "circumstances of the case, it is evident "the defendants have held the tank un "*jummai* title from before the sale in exe "tion, and therefore the plaintiffs have "right to khas possession." He made decree to the effect that the plaintiffs w confirmed in possession of their right owners of the tank; but as the allegati on which they grounded their suit was proved, while the defendants had made their case, the plaintiffs were ordered to the costs.

From this there was an appeal to Judge, who, after stating what the natur the suit was, and the Moonsiff's decision, the grounds of appeal said: "I am of opin "that defendant's possession under the le "is not proved, and there is no improbabi

whatever in Siboo Jelya and his father having held possession of the tank from year to year by payment of a share of the produce, namely, fish;" and he decreed appeal, and reversed the judgment of the Moonsiff.

It has been objected before us, that, though the title which had been set up by defendant Siboo had not been proved, appeared upon this judgment that there been such a possession as gave them a of occupancy, and, therefore, the plaintiff ought not to have a decree for possession.

This tank appears to be used only for the preservation and rearing of fish. It does appear to have formed part of any grant land, or that it can in any way be considered as appurtenant to any land held by defendant. The only thing occupied appears to be the tank itself; and the question is, whether the provisions of Act X. of 59, which would confer a right of occupancy, apply to such a tank as this.

No doubt, it may be said that a tank comes under the word land, as land covered with water. But it is to be land cultivated or not; and we think, in considering whether tank comes within the provisions of Act of 1859, we must do what was done in the Doorga Soonduree *vs.* Bibee Oomdutnissa,* 9 B. L. R., page 101, which was decided by myself, Mr. Justice Bayley, and Justice Ainslie on an appeal against the decision of Mr. Justice Glover, the senior judge, sitting with Mr. Justice Mitter. question there was whether a suit for ejectment of rent of land covered with buildings would lie in the Revenue Courts under clause 4, section 23 of Act X. of 1859. was of opinion, and Mr. Justice Bayley Mr. Justice Ainslie concurred with me, in order to see what was meant by land Act X. of 1859, we must look at all the provisions of the Act.

Following that rule in the present case, think we cannot say that the provisions of X. of 1859 are applicable to such a tank this is. For instance, the provision in section 112 of the Act, which was noticed in case, respecting the recovery of the rent the land by distress, is not applicable to a tank as this. Following that rule, are of opinion it cannot be said that a of occupancy was gained under the Act the parties in possession of this tank, though for more than twelve years.

It is, therefore, unnecessary to determine the question whether the defendant (by which we mean the intervening defendant Siboo), not having set up this case (he having set up a title under a lease which he has failed to prove), can be allowed to resist a decree to the plaintiff for possession. We think this is different from where a plaintiff fails to prove the case which he relies upon in bringing his suit, and is not allowed to set up a different case; because here, supposing the defendant has a right of occupancy, the consequence of giving the plaintiff a decree would be, that the plaintiff having got possession under the decree in this suit, the defendant would have to bring another suit to get back the possession by virtue of his right of occupancy, which would be contrary to the rule that circuity of action is to be avoided. It would not be right to give the plaintiff a possession which he ought immediately to lose by another suit; and the proper course would be finally to decide the rights of the parties in the present suit.

Or this injustice would be done, that the defendant, although entitled to a right of occupancy, would be entirely deprived of it by losing possession, and not being able to assert his right in any other suit. It would be not only depriving him of a right which clearly belonged to him, but taking away from him altogether the possession of land which he had a right to keep. However, as we have said, it is not necessary to determine that question. It is in order that it may not be supposed, if this case should arise at some future time, that we assent to the proposition that the defendant could not set up this now, because he did not do so originally by way of defence, that we have made these remarks.

The appeal will be dismissed with costs.

The 27th February 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Special Appeal—Act VIII. (B. C.) of 1869, s. 102—Additional Judges.

Case No. 355 of 1872.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 26th September 1871, modifying a decision of the Moonsiff of Magoorah, dated the 20th November 1870.

* 18 W. R., 234.

Nubo Kristo Koondoo (Plaintiff), *Appellant*,

versus

Nazir Mahomed Shaikh and others (Defendants), *Respondents*.

Baboo Bungshee Dhur Sen for Appellant.

Baboo Mohendro Lall Mitter for Respondents.

Act VIII. (B. C.) of 1869, s. 102, does not apply to a case decided by the Additional Judge.

Jackson, J.—THERE was a preliminary objection in this case that no special appeal lay under section 102 of Act VIII. (B. C.) of 1869. That section only refers to cases tried and decided by a District Judge. This case has been tried and decided by the Additional Judge.

On the merits we are of opinion that the special appellant has no case, and that the appeal must be dismissed with costs.

The 27th February 1873.

Present :

The Hon'ble W. Markby and E. G. Birch, *Judges*.

Survey-proceedings—Act II. of 1855, s. 15—High Court's Functions.

Case No. 842 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 12th March 1872, reversing a decision of the Moonsiff of Bishenpore, dated the 7th June 1871.

Ram Narain Doss (one of the Defendants), *Appellant*,

versus

Mohesh Chunder Banerjee and others (Plaintiffs), *Respondents*.

Baboo Kumla Kant Sen for Appellant.

Baboo Bamachurn Banerjee for Respondents.

Survey-proceedings, if made without reference to litigation then pending, are not only evidence, but are to be presumed to be correct, and it is beyond the functions of the High Court in special appeal to lay down any rule as to corroboration of such documents.

Markby, J.—IN this case the special appeal must be dismissed.

We think that the Judge has given a sufficient legal ground for reversing the cision of the Moonsiff, although at the time we are bound to say that we think the judgment of the Moonsiff is not open this disparaging remark which the Judge made upon it. The Judge has substanti based his judgment upon the survey-proce ings; and, looking to the circumstances the case, we think that he was quite justi in doing so. It is only reasonable to sume, inasmuch as those proceedings with the claims of the present appellant, he is named as a party, that he was pre at the time, or had notice of the proce ings. We ought not to presume that Deputy Collector who conducted those ceedings had dealt with the rights of pa who were not made aware of what going to be done.

It has, however, been contended that laid down by a decision of this Court survey-proceedings are not alone evidenc title, and possibly some color to that tention might at first sight be given by decision reported in the 2nd Weekly Repo page 210, but that decision has since explained by one of the learned Judges took part in it; and we may presume tha was well acquainted with what then place. It was explained by Mr. Ju Louis Jackson in the 13th Weekly Repo page 50, that that was only a decision reference to the facts of that particular and that it was not intended by the Ju to lay down any rule of law which w govern future cases. And we may also that that explanation of the case is correct cause, as is pointed out by Mr. Justice in the case reported in the 10th Weekly porter, page 343, these documents are evidence by Act II. of 1855, section which declares that, if made without ence to litigation then pending, they are only evidence, but are to be presumed correct. It appears to me that this C will be altogether going beyond its func in special appeal if it were to lay down rule as to whether or not such docum require corroboration from any other so

Then it is contended that the defend appellant, has been in possession for than 12 years since those survey-proceed took place, and before this action was bro and in that way he has got a title. If he c establish that fact, no doubt he might that claim a new title. But that poin think, has been disposed of by the Judge says that he does not consider the contra tions relied upon by the Moonsiff in

idence of the plaintiff's witnesses on this int to be material, and he finds that the aintiff, and not the defendant who is now pellant here, has been in possession.

Therefore, the special appeal fails upon both points, and will be dismissed with costs.

Birch, J.—I concur.

The 27th February 1873.

Present:

e Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Zemindaree Right—Multifarious Suit.

Case No. 119 of 1872.

gular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 17th February 1872.

adhur Pershad Narain Singh (Plaintiff), *Appellant,*

versus

Saheb Roy and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Mohesh Chunder Chowdhry and *ama Churn Banerjee* for Respondents.

suit in which plaintiff alleged that the defendants ding ryots against whom he had been unsuccessful e Collector's Court) had in combination fraudulently ed themselves of a fabricated jummabundee-paper idence to support certain *mokurruree*-claims, and thereby ousted him from the full enjoyment of his *yut* right, was HELD to be single in its character, not multifarious.

Phear, J.—It appears to us that the Subinate Judge has misapprehended the nature he suit very materially. He has dismiss- he plaintiff's claim on the ground that it is tifarious. But, so far as we understand he plaintiff puts forward a claim which ntirely single in its character; it may of rse be good, or it may be bad; the defend- or some of them may have a very good wer to it. But, taking it as it is brought re the Court by the plaintiff, it certainly ears to us, as we have said, to be single. very shortly this: The plaintiff says he is entitled to a 6 annas 8 pie share, *yut* (zemindaree) share, in the mouzah a, and that he has been ousted from by the action of the defendants.. The in which he has been ousted according his statement appears to be this: that one Ramessur Roy, the ancestor of the defendants, during the minority of the plaintiff, being concerned in the management of the zemindaree business, took the opportunity of forging a certain jummabundee-paper for 1251 Fuslee, entering in that paper certain tenures of a permanent character in favor of himself and other members of his family. The plaintiff says that he knew nothing about this until a certain time after he attained his majority, when he had occasion, namely, in 1275, to bring a suit against some of his ryots; and then he was met by defences founded upon this jummabundee-paper. In the Collector's Court, these defences were successful, and he now comes into the Civil Court alleging that the present defendants have in combination fraudulently, and with the full knowledge that that jummabundee-paper was a fabricated paper, availed themselves of it as evidence to support certain mokurruree claims which they have made, and in that way have ousted him from the full enjoyment of his *milkyut* right. The plaintiff may or may not be able on the evidence to support this case. But we repeat that it seems to us to be certainly single in its character, and not multifarious. We think it ought to be tried. The Subordinate Judge was wrong in dismissing the suit upon the ground on which he has dismissed it.

We accordingly remand the case to the lower Court for trial.

Costs to abide the result.

The 28th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Charles Pontifex, *Judge.*

Small Cause Court, Calcutta—New Trial—Act XXVI. of 1864, s. 5.

Reference to the High Court under section 7 of Act XXVI. of 1864 by the 1st and 2nd Judges of the Court of Small Causes at Calcutta.

Pursonchund Galacha, *Plaintiff,*

versus

Kanooram and another, *Defendants.*

Mr. Phillips for Plaintiff.

Mr. Jackson for Defendants.

It is competent to the Judges of the Small Cause Court, Calcutta, to grant a second new trial in the same case.

Reference.—In this case judgment was given originally in favor of defendants on the 14th day of December last.

On the 27th day of January following, the plaintiff obtained a rule to show cause why there should not be a new trial, and this rule was made absolute on the 10th day of February following.

On the new trial judgment was again given in favor of defendants.

On the 20th day of July following, the plaintiff again moved for, and obtained, a rule to show cause why there should not be another new trial; and this rule was, after argument by Counsel on both sides, and on special grounds, also made absolute, but subject to the opinion of the High Court on the question "Whether it is competent to the "Judges of this Court to grant a second new "trial in the same case."

This question we were requested by the learned Counsel for the defendants to reserve, and we have now the honor to request the opinion of the Honorable the Judges upon it.

Mr. Jackson (for the defendants).—The learned Judges of the Court of Small Causes have no power to grant more than one new trial in the same cause. The practice of that Court respecting new trials is regulated by Rules 55 to 59 of the Rules of Practice. Rule 55 directs by what Judges the motions for new trials and new trials are to be heard. Then in Rules 56, 57, 58, and 59, the practice is pointed out, should the Court be of opinion that a new trial should be granted in any particular case; and the singular number "new trial" is used in these rules, showing that it was intended that only one new trial could be granted in a cause. It was held in Blacquiere *vs.* Hawkins (1 Douglas 379) that the inferior Courts could not grant a new trial. Their power to do so now is derived from various statutes, and the statutes must be looked to in order to see the extent of their power. The Mayor's Court in London has the power to grant a second new trial, but the statute under which it has that power, 20 and 21 Vic., c. 152 (Local and Personal Acts), contains the words "new trials;" and that is the marked distinction between that Act and the Act conferring the power on the Small Cause Court to grant new trials, namely, Act IX. of 1850. Moreover, under Rule 58, if the verdict on the hearing of the second trial is entered for the plaintiff, the judgment may be satisfied *pro tanto* out of the sum paid into Court by the defendant under Rule 20 for the debt and costs, and execution-issue for the balance; thus clearly showing that the verdict on the second trial was intended to be final between the parties. There is no direction that the sum so deposited shall be detained to enable the defendant to move for a re-hearing of such new trial; and should the question referred to your Lordships be decided in the affirmative, the defendant may be successful in the second new trial and yet not be able to recover his deposit taken out by the plaintiff. And, under the next rule, if the verdict is entered for the defendant, he is at liberty to withdraw his deposit, and thus the plaintiff loses his security for the payment of his judgment debt, should he be successful on the hearing of the second new trial. [*Pontifex, J.*—Is not that difficulty met by the provisions of section 53 of Act IX. of 1850, which provides that the Judges shall have the power "to order a new trial to be had, upon such terms as they shall think reasonable, and in the meantime stay the proceedings?"] I submit that section does not apply to second new trials. It enacts that every order and judgment of the Court shall be final and conclusive between the parties, with a proviso that, should the Judges think fit, they may grant a new trial, and stay the proceedings on the first hearing. Under this section I submit the Judges have power to grant only one new trial in each cause if they think fit to do so; and the verdict entered on the hearing of such second trial is to be final and conclusive.

Mr. Phillips (for the plaintiff).—The wording of Act IX. of 1850 and of the Rules of Practice is not restrictive. The Act gives the power to the Judges to grant new trials, and the rules merely direct the course to be adopted for the hearing of each new trial, but in no way restrain the Court from granting a re-hearing of a new trial. I submit this question ought to be answered in the affirmative, and the defendants ought to pay the costs of this reference.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—The question which has been referred to us by the Small Cause Court is whether "it is competent to the Judges of this Court" (meaning the Small Cause Court) "to grant a second new trial in the same case." It appears that the Judges of the Small Cause Court had determined to grant a new trial subject to the opinion of this Court; and we may, therefore, take it that they considered the case was a proper

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for a new trial. The language of sec- 53 of Act IX. of 1850 is certainly iciently large to allow a new trial being nted after a previous new trial. It says "every order and judgment of any rt holden under this Act, except as in provided, shall be final and conclusive reen the parties; but the Judges shall power to non-suit the plaintiff in every in which satisfactory proof shall not iven to them, entitling either the plaintiff efendant to the judgment of the Court; shall also, in every case whatever, have power, if they shall think fit, to order a trial to be had, upon such terms as they think reasonable, and in the meantime ay the proceedings." It is reasonable, is in accordance with the practice of the rts in England, to grant a new trial after evious new trial if it seems necessary he ends of justice. There are instances England in the Common Law Courts in the Courts of Equity where more one new trial has been granted, it aring proper that it should be done. We the same rule may be applied here. must assume that the Judges of the l Cause Court will not exercise this r unless it appears to them to be right so, and they have power to impose such s as they may think reasonable. We the question which has been referred must be answered in the affirmative, it is competent to the Judges of the l Cause Court to grant a second new in the same case.

ch party will pay his own costs of stat- he case and taking the opinion of this t.

The 28th February 1873.

Present:

Hon'ble J. B. Phear and W. Ainslie, *Judges.*

hancement of Rent—Presumption of Uniform Rent—Act VIII. (B. C.) of 1869, s. 4— Notice —Suit by Ryot.

Cases Nos. 447 to 450 of 1872.

ecial Appeals from a decision passed by the Judge of Tirhoot, dated the 29th September 1871, reversing a decision of the Moonsiff of Moozufferpore, dated the 26th May 1871.

Ram Bhurosee Singh (Plaintiff), *Appellant,*

versus

Syud Mahomed Asguree Khan and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Mr. R. T. Allan for Respondents.

In suits to set aside notice of enhancement, where plaintiffs put in evidence (in two cases) a chittee of 1257 B.S. and (in a third) a decree of 1857 citing an earlier chittee, showing that they had long held at existing rates, and there was no evidence to prove that the land had not been held at those uniform rates from the Permanent Settlement, or that such rent had been fixed at some later period, plaintiffs were HELD entitled to the presumption prescribed by Act VIII. (B.C.) of 1869, s. 4.

A ryot who has received a notice of enhancement may be in a different position relative to its sufficiency according as he waits until a suit is brought against him, or comes into Court of his own accord to attack the notice. In the latter case, if he frames his suit on a thorough understanding of the notice, he cannot object to it as not reasonably sufficient.

Phear, J.—IN each of these four cases, the plaintiff is a ryot who has been served by his zemindar with a notice of enhancement of rent, and he comes into Court before the expiration of the year of notice in order to have the effect of that notice set aside upon three grounds common to all four cases. In each case the plaintiff's first ground is that he has held at an uniform rate of rent since the time of the Permanent Settlement and therefore is not liable to enhancement; second, that the notice of enhancement is bad on the face thereof, and cannot be made the foundation for the claim of rent at an enhanced rate; third, that the grounds of enhancement stated in the notice are not true and good grounds.

In all four cases, the first Court gave a decision in favor of the plaintiff; and the Court of appeal reversed the decision of the first Court. The Lower Appellate Court is of opinion that the plaintiff in each case has failed to make out any one of the three grounds which we have mentioned.

In cases 448 and 450, there is in evidence on the side of the plaintiff a chittee written in the year 1257 by the amla of the then zemindar to the plaintiff's predecessor, running in these terms:—

"Out of the lands of the said mouzah, "paddy, homestead, bamboo and garden-lands "have long been held by you as 'hurghosee "jote,' or a tenure paying rent at rate or "rates prevailing in the neighbourhood. "Its rate is as described below, and jumma "or rent has been and is Sicca Rupees 15-2½."

And the schedule given below specifies in

detail the rates of rent for each description of land; and it appears by defendant's notice of enhancement, which is the subject of suit, that these rates are precisely the rates which the plaintiffs in these two cases were paying at the time when the suit was brought.

There is also oral testimony of witnesses to the effect that the same rates were paid throughout a considerable period of time by the plaintiff. It seems to us that this evidence, if it stands alone, completely makes out that the plaintiffs in these cases had, for a period of more than 20 years immediately preceding the date of the suit, been paying rent for their lands at uniform rates. And there is in fact no evidence whatever to put in the balance against this, and consequently the plaintiffs are entitled to have the benefit of the provisions of sections 3 and 5 of Act VIII. of 1869 (B. C.), unless there is evidence on the record to prove that the land in question had not been held at that uniform rate of rent from the time of the permanent settlement, or that such rent was fixed at some later period. Again, however, there is no evidence in either of these cases tending in any way to prove either branch of this alternative. It seems, therefore, to us that, as a matter of law, the plaintiffs in each of these two cases are entitled to have the presumption prescribed by section 4, Act VIII. of 1869 (B. C.), made in their favor. Consequently, the Lower Appellate Court has committed an error in law in not giving them the benefit of this presumption.

The case 449 stands very nearly upon the same footing as the cases 448 and 450. There is no actual chittee in this case as in those two cases; but there is a decree, dated the 23rd July 1857, made between the ancestors of the parties to the present suit, and reciting an earlier chittee. By this decree, the ancestor of the present plaintiff was protected from enhancement of rent beyond the limit which he had, from that time up to the date of the suit, been paying. It seems, therefore, that the effect of this evidence is precisely the same as the effect of the evidence which we have just referred to in cases 448 and 450; and that consequently the plaintiff in 449 is also entitled to have the presumption of law raised in his favor to the effect that he has been holding at an uniform rate of rent from the time of the Permanent Settlement.

The case 447 is altogether in a different situation. Not only did the Lower Appellate Court in this case find against the plaintiff in respect of the allegation of the uniform payment, but the first Court did so also. The Moonsiff, after dealing at considerable length with the evidence, came to the conclusion that the plaintiff had failed to make out that he had held for 20 years previous to the suit at an uniform rate of rent. It seems to us that his finding on this point is well founded, and entirely unimpeachable on special appeal.

The second ground upon which the plaintiff based his suit, namely, that the notice was informal on the face of it and insufficient, is not, we think, made out. It seems to us that a ryot who has received a notice of enhancement of rent may be in a somewhat different position relative to the sufficiency of the notice according as he waits until a suit has been brought against him for enhancement of rent, or comes into Court of his own accord to attack the notice. Here he comes into Court as a plaintiff, and has undertaken to prove that the notice was not a reasonably sufficient notice to him. It seems to us, reading the notice as a whole, that, although it may not be very happily or completely worded, yet it does inform the plaintiff of the ground on which he was to pay the enhancement of rent. And indeed it appears to us that he thoroughly well understood it, judging by the way in which he has framed his suit; for he has come into Court with evidence to show that the adjacent lands held by like tenants to himself did not give substantially those rates of rent which the notice requires of him.

Next, as to the third ground upon which the plaintiff bases his action, as we have already said, the Lower Appellate Court finds against him on this head as well as upon the two others; but the Judge states his opinion in very general terms. He says: "The "Moonsiff has gone into the evidence for the "defendants as to the question of rates, and "has rejected it. I do not agree with him. "The witnesses are respectable men who "hold land in the immediate neighbourhood, "and they prove that the rates claimed by "the defendants are such as are paid near "them, and that the plaintiff's land is as "good, or some say better, than that for "which the amount of rates claimed are "paid."

It seems to us that the Judge has not here applied his mind so directly to the issue which he had to determine as he ought to have done. The real question was whether, on the evidence before the Court, it appeared that ryots of a like character to the plaintiff paid for like lands to his, and lying adjacent

his, substantially the same rates of rent those which the defendant claimed in the tice. The plaintiff gave general evidence the contrary of this. He pointed out, so as we can judge by the Moonsiff's judgent, that various rates were paid for like nds in the neighbourhood, and that there s not anything which could be called bstantial uniformity in the matter so far as garded lands like his own. He, at any e, made a good *primâ-facie* case for the fendant to rebut, and it was certainly cumbent upon the Judge to make his cision definite upon this point. He ought have found on a balance of evidence ether or not like lands held by ryots of e character and status to the plaintiff paid rates which the defendant sought for in notice. He unquestionably has not done s; and it does not appear to us from the dence, so far as it has been brought under r notice, that there was before him suffient evidence to justify him in finding the rmative of such an issue.

On the whole, then, we are of opinion t the Judge's decision on this third point nnot be allowed to stand. We also think t it is unnecessary to send back the case him for the purpose of re-consideration.

The result then is that in 447, as well in e three other cases, the decision of the wer Appellate Court must be reversed with sts.

The 28th February 1873.

Present:

e Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex, *Judge*.

Costs—Certificate—Appellate Court—Act XXVI. of 1864, s. 9.

peal from the judgment of the Hon'ble A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

Kewata Mug (Defendant), *Appellant*,

versus

Nobocoomar Dass and another (Plaintiffs), *Respondents*.

r. Lowe and *Mr. Banerjee* for Appellant.

Mr. Phillips and *Mr. Gregory* for Respondents.

A certificate as to costs under s. 9, Act XXVI. of 1864, may be given at any time. Where the Judge in the original Court omitted to certify the case under that section, the Appellate Court held that the omission was one which they were at liberty to supply, if they considered the case a fit one to be brought in the High Court.

THIS was an appeal from the decree of Mr. Justice Macpherson, declaring the plaintiff entitled to recover the sum of Rs. 987 from the defendants, and directing the defendants to pay the same with costs. The following is the judgment of Macpherson, J., in this case:—

I think the defendants prove they paid Rs. 1,025, but that the plaintiff is entitled to the two sums of Rs. 711-15 and Rs. 225, being in all Rs. 936, and to the Rs. 50 which have been paid into Court. There will be a decree accordingly with costs on scale 2.

The defendant Nobocoomar Dass appealed against this decree, amongst others, on the following ground:—

"*Sixth.*—For that, at any events, the said learned Judge ought not to have directed this defendant to pay the plaintiff's costs."

Mr. Lowe (with him *Mr. Banerjee*) for the appellants.—The last ground of appeal is against the order for the payment to the plaintiff of the costs of this suit. The plaintiff having recovered a sum of less than Rs. 1,000, is not entitled to costs from the defendant, for the learned Judge who tried the case has not certified the action as fit to be brought in the High Court. Section 9, Act XXVI. of 1864, directs that, in cases brought in the High Court where the plaintiff recovers less than a certain amount, he shall not have his costs unless the Judge who tried the case "shall certify that, by reason of the difficulty, novelty, or general importance of the case, or of some erroneous course of decisions in like cases in the Court of Small Causes, the action was fit to be brought in the High Court."

[*Couch, C.J.*—Mr. Justice Macpherson has not expressed any opinion as to whether the case was a difficult, novel, or important one, but he has in the decree directed the defendants to pay the costs. You were at liberty to apply to him and ask whether or not he would certify.] I submit it was the plaintiff's duty to see that the certificate was given for his costs. The ordinary direction for costs in the decree was not enough. Under the provisions of the Act already referred to, a distinct order is required stating the reason why the costs are given to enable the plaintiff to recover them. And by Rule 28 of the Rules of Practice of the High Court "no

costs will be allowed to the plaintiff in cases where the Small Cause Court has jurisdiction, unless the Judge or Court, in the exercise of ordinary civil jurisdiction, shall otherwise direct."

[*Couch, C.J.*—It may be that, if the attention of Mr. Justice Macpherson had been called to the point, he would have granted a certificate, and he may be ready to do so now.] Could Mr. Justice Macpherson do so now that the decree has been signed and appealed against? [*Pontifex, J.*—You ought to have taken your objection before the decree was signed. If Mr. Justice Macpherson can grant his certificate now, it is no matter for appeal.] I submit we are entitled to take the objection now. It was for the Registrar to have taken the objection before the decree was signed, and thus brought it to the notice of the Court.

Mr. Phillips (with him *Mr. Gregory*) for the respondents contended that the order in the decree was sufficient to satisfy Act XXVI. of 1864 and Rule 28 of the Rules of the High Court; that it was no ground for appeal, but the proper course was to have applied to Mr. Justice Macpherson; and that, if it was properly a matter for appeal, the Appellate Court had the power to grant a certificate.

The Court, having taken time to consider, delivered the following judgment on the 28th of February:—

Couch, C.J.—In this case the plaintiff sought to recover Rs. 1,811-6-5 for tobacco sold by him to the defendant on the 29th of August 1871, after giving credit for Rs. 200 which the plaintiff said was paid on that day. The defendant alleged that there was due to him on a previous transaction (a sale of tobacco by defendant to the plaintiff) a sum of Rs. 711-15. He also alleged that he paid to the plaintiff Rs. 1,025 and not Rs. 200 only, as the plaintiff stated; and further, that upon an adjustment of the accounts between them, the plaintiff out of a balance of Rs. 275-3 pie agreed to make an allowance of Rs. 225-3 pie, leaving a sum of Rs. 50, which the defendant admitted to be due.

With reference to the Rs. 711-15, the plaintiff's case was that the previous transaction had been entirely settled, and that no balance remained due from him to the defendant. The suit was heard by Mr. Justice Macpherson, and he in his decision said: "I think the defendants prove they paid Rs. 1,025, but that the plaintiff is entitled to the two sums of Rs. 711-15 and Rs. 225, being in all Rs. 936, and to the Rs. 50 which have been paid into Court." The defendant has appealed from the decree. The questi which we had to consider was whether t learned Judge was right in finding that t plaintiff was entitled to the Rs. 711- and the Rs. 225. Now, as I have said, t question as to the Rs. 711 was wheth the plaintiff had paid to the defendant that was due upon the previous sale tobacco by the defendant to the plaintiff. hathchitta was entered into, which was p duced, and it appeared to be cancelled the signature of the plaintiff being stru through. It was not disputed that it w struck through with the assent of the defen ant; but the parties differed as to the c cumstances under which it was done. T plaintiff's case was that he had from time time paid sums of money to the defend on account of what was due upon that tra action, and, finally, it being all paid, it w agreed that his name should be stru through, and the hathchitta cancelled, and evidence was to that effect. That is a c cumstance which *primâ facie* imported t the transaction had been closed, because, i were true, as the defendant alleged, tha balance still remained due to him, it wo be inconsistent to allow the document to cancelled in the way it was. The defen ant's case was that a settlement was come of the transaction which is the subject this suit, and that the balance of Rs. 711- due on the former transaction was tak into account; that there was also agreement to make an abatement of Rs. 225; and when the whole matter w settled, the hathchitta was cancelled. In t way he sought to explain the appearance it, and alleged that the cancellation was n to show that the money due upon it h actually been paid, but that the amount h been carried into the account of the subs quent transaction. Now, which case was be considered the true one depended up the degree of credit to be given to the w nesses on one side or the other. The plai iff gave his evidence, and defendant gave h and produced witnesses; but it was a mat I think peculiarly for the learned Judge, w had all these parties before him, to determi on which were speaking the truth. He h come to the conclusion that the plainti evidence was true with regard to this matt although he seems to have thought that did not tell the truth with regard to t Rs. 1,025 not having been paid. Certai we are unable to say that he was wrong coming to that conclusion. We can see n thing which would justify us in saying th

ought to have disbelieved the plaintiff on point, and ought to have believed the dant. It depends very much upon the of persons they were, the degree of ligence which the plaintiff or the de- ant might possess, which party was to be telling the truth.

he same remark applies to the Rs. 225. is a matter which rested entirely upon evidence of the one party or the other. defendant alleged that there was an ement to make this allowance. There not seem to be anything to induce the iff to make such an allowance as that. s said (and the observation is not with- ome weight) he was acting for other ns, and not on his own account; and this would make it less likely that he d make an allowance to the defendant. learned Judge has considered that the iff's statement that he did not agree to the allowance is true, and we cannot at he was wrong, and that he ought to come to a different conclusion. Conse- ly we must affirm his decree.

objection was taken that, the decree for a sum less than Rs. 1,000, the award ts was erroneous, because there was no cate under section 9, Act XXVI. of . Now a certificate under that section according to the words of it, be given y time. The words do not require that uld be given immediately. It says that shall not be allowed unless the Judge a certificate. The case, then, is that earned Judge has made a decree for in express terms; he says: "There be a decree accordingly with costs on 2;" but he has omitted to determine uestion whether by reason of the diffi- novelty, or general importance of the the action was fit to be brought in the Court. We think that is an omission the case having come before us in l, we are at liberty to supply; and if onsider that the action was fit to be ht in this Court, we may, acting as an llate Court, supply what has been ed. We may determine any question it was essential to determine, and may y that it was a proper action to be ht in the High Court. We have no tion in doing that, because we have ained from the learned Judge that, if ention had been called to the necessity certificate, he would have granted it.

e appeal must be dismissed with costs ale No. 2.

The 28th February 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Limitation — Onus Probandi—Issues—Remand —Appellate Court.

Case No 783 of 1872.

Special Appeal from a decision passed by the Deputy Commissioner of Julpigoree, dated the 17th February 1872, affirming a decision of the Moonsiff of that District, dated the 22nd August 1871.

Niljaree and another (Defendants), *Appellants,*

versus

Mujeeboollah and others (Plaintiffs), *Respondents.*

Baboos Doorga Mohun Doss and *Boodh Sen Singh* for Appellants.

Moonshee Mahomed Yusuf for Respondents.

In a suit for a share of the property of a deceased minor admitted to have been instituted ten years after her death, the *onus* was held to be on the plaintiffs, to prove that their suit had been brought within twelve years of the date of such death.

Where a Court of first instance decides the issue of limitation in favor of the plaintiff, and the other issues against him, and the Appellate Court, without passing any judgment on the question of limitation, remands the case for further investigation, it is competent to the Appellate Court, when the whole case comes before it ultimately in appeal, to try the question of limitation.

Kemp, J.—The plaintiffs in this case, special respondents, sued for a two-third share of the estate of Fooljaree. The suit was governed by the Mahomedan law. The plaintiffs alleged that their father was alive at the death of Fooljaree; that he was entitled to a two-third share, and Niljaree, the defendant, special appellant before us, to a one-third share. The defence was two pleas in bar—limitation and *res adjudicata;* and on the merits it was stated that the plaintiffs are not residuary heirs under the Mahomedan law; that there were other heirs alive at the time Fooljaree died, and therefore the father of the plaintiffs was not, as alleged by them, entitled to a two-third share.

The Moonsiff in the first instance on the first plea in bar, *viz*, limitation, was of opinion that it appeared from a petition of the 19th Cheyt 1264 that Fooljaree was then alive, and was then a minor, and that the suit of the plaintiffs which was brought in 1276 was

in time, from that date, namely, the 19th Cheyt 1264. Here it may be mentioned that the contention of the defendant was that Fooljaree died in Jeit 1264, and that the suit was brought twelve years and three months from that date. The first Court then, on the second issue in bar, that of *res adjudicata*, dismissed the plaintiffs' suit.

The plaintiffs appealed to the Deputy Commissioner. The Deputy Commissioner found that the suit was not liable to be dismissed on the ground of *res adjudicata*, and remanded the case.

The defendant appealed specially to this Court, and this Court, on the 18th of November 1870, dismissed the special appeal, observing that there were other objections made to the plaintiffs' title, for which a remand had been made, and which objections would be tried on that remand.

The Deputy Commissioner, on the question of limitation, while admitting that one of the main grounds of the appeal to him was as to whether the suit was barred or not, found that the question of limitation was disposed of by the High Court in special appeal, and that the *onus* of proving that the plaintiffs' suit was barred was on the defendant. On the merits, the Deputy Commissioner concurs with the lower Court, and gives no separate reasons in his judgment.

The only ground of special appeal on which any argument has been raised is that the Deputy Commissioner is wrong in holding that the question of limitation was disposed of by this Court in special appeal; and also, further, that the Deputy Commissioner is wrong in thinking that the *onus* of proving that the plaintiffs' case is barred was on the defendant.

In this case, following the ruling of the Privy Council, we think, assuming that the contention of the plaintiffs, was correct that Fooljaree died in 1866, and the suit having admittedly been instituted ten years after her death, that the *onus* was on the plaintiffs to prove that their suit has been brought within twelve years of the date of Fooljaree's death.

It is also clear, on referring to the decision passed by this Court in special appeal, that the question of limitation was not before the Court and was not decided. The only point before the Court was the appeal of the defendant against the decision of the Court below on the question of *res adjudicata*. In a case to be found in Volume VII., Weekly Reporter, page 67, it has been ruled that, where a Court of first instance decides the issue of limitation in favor of the plaintiff, and the other issues against the plaintiff, an the Appellate Court, without passing a judgment on the question of limitation, a mands the case for further investigation, it competent to the Appellate Court, when t whole case comes before it ultimately appeal, to try the question of limitati We therefore think that this case must remanded to the Deputy Commissioner a finding upon the issue of limitation.

Costs to follow the result.

The 1st March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainsl *Judges.*

Evidence—Right of Defendant.

Case No. 491 of 1872.

Special Appeal from a decision passed the Subordinate Judge of Patna, d the 23rd December 1871, reversing decision of the Moonsiff of Behar, d the 22nd July 1871.

Man Singh Mahtoon (Defendant), *Appell*

versus

Bhaik Narain Mahtoon (Plaintiff), *Respond*

Moonshee Mahomed Yusuf for Appella

Baboo Grish Chunder Ghose for Respond

A defendant is entitled to insist that the plaintiff s prove his right by the best available evidence, *e.g.*, production of a ticca lease, upon the terms of w the claim is alleged to depend entirely.

Phear, J.—It appears to us that the Lo Appellate Court was in error when it o ruled the decision of the first Court w regard to the non-production of the le The plaintiff sued to recover rents from t defendant for the years 1275 and 1276, up the ground that he was entitled to reco them as an assignee of a certain sharehold under a ticca lease. His right to recover his own statement of the case depend entirely upon the terms of that ticca lease.

The defendant objected in the first Co that the plaintiff was not such ticcadar as alleged, and challenged him to produce h lease. His lease was not produced and w not accounted for; and accordingly the fi Court was of opinion, and we think righ of opinion, that the plaintiff had not d laid the foundation for his suit.

The plaintiff appealed against this decision. nd the Lower Appellate Court in its judg-ent says, that, although the ticca lease was t produced, nevertheless the plaintiff has fficiently proved his possession as ticcadar r some of his witnesses.

It appears to us that this as a matter of inciple is quite wrong. The defendant was erfectly right in insisting upon having the est proof. But, even if that had not been e case, it further seems to us that the ridence of these witnesses, so far as we ive been informed of it, failed to show that e plaintiff had been in possession of the nd in respect of which he sued for rents as ccadar, because those witnesses did not say at he ever in any capacity had enjoyment the rents and profits of this particular rtion of the land; they only spoke of him being ticcadar during the very years in spect of which he is suing for rents. So at, on these facts, he was not at any time possession, as ticcadar, of the land for hich he now sues to recover the rent.

As we have already said, however this ight be, we think the defendant was quite itled to insist that the plaintiff should ove his right by the best available evidence. hat evidence was the ticca lease which, cording to the plaintiff's own case, was the ound upon which he sued. We think the cision of the Subordinate Judge is wrong, d must be reversed, and the decision of the t Court affirmed with costs.

The 14th February 1873.

Present:

rd Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mafee-birt Tenure"—Hindu Law—Succession—Service Tenures.

n Appeal from the High Court of Judicature, North-Western Provinces, Allahabad.

Rajah Mahendra Singh

versus

Jokha Singh and others.

Whatever the words "mafee-birt tenure" may have ported originally, the *primâ-facie* meaning of the rds has come to be a hereditary tenure.

Where ancestral property has apparently descended in the ordinary way of Hindu property, first to the son, and thence to the mother, it lies on those who say that it is confined to the direct descendants of the original donee to prove their case, and show by some custom that that was the proper construction of the grant.

Where the original donee of a service-tenure ceases to do any service, and pays in lieu a rent which his descendants continue to pay, the condition of the tenure becomes altered from service to rent.

This is a suit which was brought originally by the respondents to recover the possession of, and property in, a village called Mouzah Sumaroon. The original respondents, the plaintiffs in the suit, claimed to be heirs of a person named Theodeen, and beyond all question they proved that the property in question had been enjoyed by the father of Theodeen, Bhowanee Singh; that on his death it had descended to his son Theodeen; and on Theodeen's death it had gone to his mother as his heir; and that would *primâ facie* be evidence that this was property which went from heir to heir in the ordinary way of Hindu property.

But, then, in answer to that, there is produced the actual pottah by which the property was originally conveyed to Bhowanee Singh; and it is contended that, notwithstanding this property went from him to his son, and then from the son to the mother, it really was only a property which Bhowanee Singh was entitled to hold for his life, and that appears to have been so held by the first Court before which it came, and then by the first Court of appeal, those judgments having been reversed by the High Court.

Now, the words of the grant are: "I, "Surubjeet Singh, do hereby declare that I "have given Baboo Bhowanee Singh mouzah "Sumaroon in Tuffeh Surrou, Pergunnah "Ratonpoor Bansee, with all its cardinal "boundaries and the julkur, bunkur, and "roads, as a "mafee-birt tenure," in lieu of his "share in mouzah Deorah, and he can take "possession thereof in perfect security, and "continue to do service to me, and that "whoever of my descendants should become "raja, he should maintain this grant."

The High Court, in the first place, appear to have been of opinion that the words "mafee-birt tenure" *primâ facie* import that it is an hereditary tenure, and their Lordships do not dissent from that opinion. As far as an explanation of the words "mafee-birt" is given in the authorities, in Wilson's dictionary and so forth, it would rather appear that whatever they may have imported originally, a "mafee-birt tenure" has, at any rate in a great number of instances, become an hereditary tenure. Their Lordships do not dissent

from the opinion that *primâ facie* that would be its meaning.

But then there are various considerations which appear on the facts to support that conclusion. There is what I have already stated, that it has actually descended without dispute from the original donee to his son, and from his son to his mother. That would *primâ facie* tend to show that it was an hereditary property. Besides that, it is said to be given "in lieu of his share in mouzah Deorah." Well, then, what was mouzah Deorah, and what were the rights of the parties to that? The defendant in his written statements says: "The village in suit, and "another village named Deorah, was given in "lieu of service to the ancestor of Bhowanee "Buksh. When the latter village came into "the possession of the plaintiff's ancestor "in lieu of service, the village in suit was "given to Bhowanee Buksh Singh, the "father of Theodeen Singh, in lieu of service."

Therefore, it appears that both the villages, mouzah Deorah and the village in question, had been, according to this statement, given in lieu of service to an ancestor of Bhowanee Buksh. If that is so, it seems clear that the pottah in question was given for the purpose of dividing that property which they held jointly, and giving Bhowanee Singh the interest in mouzah Sumaroon in lieu of the joint-interest which he previously had in both properties. That would seem to show very clearly that these two villages had originally been ancestral property, as they were given to some ancestor of Bhowanee Singh.

Then it is said that they are in lieu of service. No doubt, that is stated in this document also. Their Lordships do not think there is anything to show that that was a service of a kind which prevented this being ancestral property descending in the ordinary way.

Well, then, in addition to that, some proceedings were taken before the Collector during the time that the widow was in possession of the property; and, as their Lordships read those proceedings, first, there was the petition of the widow, she claiming then to have not merely the "birt" rights, but claiming to be the zemindar. He disputed that; and, as their Lordships read the answer he made to that petition, he practically admitted that she was entitled to hold it as property which had descended to her, though he denied her the rights of a zemindar. Then, no doubt, these proceedings appear to have ended in a sort of award made by the Collectors, which apparently was made by consent; the result of which was, that, instead of paying the Rs. 29. which had been previously paid, she was to hold it rent-free and give it up at her death. It is not, in fact, contended that that award can in any way bind the plaintiffs.

The great argument which has been adduced before their Lordships is, that, though this was ancestral property—descendible property—yet it would descend only to the direct descendants of the original donee. Their Lordships are of opinion that it being proved not to be originally for life only, but to be an hereditary property, and having apparently descended in the ordinary way of Hindu property, first to the sons, and then from the son to the mother, it lies on those who say that it is confined to direct descendants, and that no one can claim it but the direct descendants of the original donee, to prove their case, and show that by some custom that was the proper construction. In the absence of that, their Lordships agree with the conclusion to which the High Court came, that this was property which went in the ordinary way of Hindu property.

But, then, it was said by Mr. Leith that the Court below ought to have said on what terms this property was to be held, if it was held at all; and their Lordships are of opinion that, though it was originally given rent-free, yet that, as the original donee ceased to do any services, and paid a rent of Rs. 29 per annum in lieu of those services; that that sum continued to be paid by his son, and then was continued to be paid by the mother, at any rate until she made the agreement; that the proper conclusion therefore is that no service is now to be performed, and that it is to be held on the payment of an annual fixed rent of Rs. 29. Their Lordships think that the decree of the High Court should be varied by inserting this declaration; but that this variation should make no difference as to the costs; and that, subject to that alteration, the appeal should be dismissed.

Their Lordships will, therefore, humbly recommend Her Majesty that the decree of the High Court should be varied by inserting a declaration that the property is to be held subject to the payment of an annual fixed rent of Rs. 29, and that, with this variation, the appeal should be dismissed with costs.

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The 19th February 1873.

Present:

he Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

vidence—Ex-parte Decree—Ameen's Report—Butwarra and Resumption Proceedings.

Case No. 222 of 1872.

pecial Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 10th October 1871, affirming a decision of the Officiating Moonsiff of Brahmunberiah, dated the 31st January 1870.

hunder Coomar Dutt and another (two of the Plaintiffs), *Appellants,*

versus

y Chunder Dutt Mojoomdar and another (Defendants), *Respondents.*

Baboos Aushootosh Dhur and *Doorga Mohun Doss* for Appellants.

aboos Komesh Chunder Mitter and *Chunder Madhub Ghose* for Respondents.

It is not the business of the Court which has to deal h facts to take up *seriatim*, one by one, the different rtions of the evidence. What it has to do is to take e evidence in all its parts, consider the bearing one it has upon another, and see whether, taking the whole gether, a case has not been made out.

A defendant who omits to defend a suit, and allows an *x-parte* decree to be passed against him, cannot afterrds object to the decree as no evidence.

An Ameen's report cannot be pronounced to be void *initio*, because it is based on butwarra and resumpn proceedings, which had been referred to him for mparison with the land in dispute.

Jackson, J.—In this case, we are thoroughr satisfied that the Subordinate Judge who ard the appeal after remand as well as on e first occasion has not dealt with it and th the evidence upon sound judicial princiles. His judgment from first to last, we feel ound to say, displays, from whatever cause, strong leaning towards one side, and a disosition to set aside for any reason, whether ood or bad, the several documents and proofs lied upon by the other side. Without oing through the whole of the judgment, it eems sufficient to point to such passages as hese, which sufficiently illustrate our meanng. In one passage the Subordinate Judge ays: "Fourthly, the rent decree of 20th July 1850 is surely no evidence of proprietary title and possession in 1869 in a country where twelve years of honest possession by an opposite party is sufficient to protect the possession from further molestation, and the "*ex-parte* rent-decree of 7th January 1867, "after an interval of sixteen years, is *per se* no "evidence like all *ex-parte* decrees, espe-"cially as in this instance it does not seem that "the decree was ever executed." It is not the business of the Court which has to deal with facts to take up *seriatim*, one by one, the different portions of the evidence; as for example, this portion which, taken by itself, may not go to prove anything. What the Court has to do is to take the evidence in all its parts, consider the bearing which one part has upon the other, and see whether, taking the whole together, a case is not made out. The Subordinate Judge says that the rent-decree of the 20th July 1850 is no evidence of proprietary title and possession in 1869. It is not quite clear what he means by this expression. If the question was whether, in a suit brought in 1869, there was evidence of right of property and possession being exercised by the claimant within a certain period before the commencement of the suit; surely a rent-decree obtained in 1850, and another in 1867, taken together, do afford strong evidence, if possession is not shown to have been intermediately interrupted, that plaintiff had been exercising rights of ownership by receipt of rents and profits.

The Subordinate Judge uses the expression that an *ex-parte* decree is *per se no evidence like all ex-parte decrees.* If he means to say that a defendant, by omitting to defend a suit, and allowing an *ex-parte* decree to be passed against him, is to be able afterwards to object that the decree so passed is no evidence, he lays down a doctrine which is quite novel and, we need hardly say, entirely erroneous.

Again, in another place, where he is dealing with the kubooleut adduced by the plaintiff, the Subordinate Judge says: "But when Raj Narain and Radhanath or "their representatives quarrel for shares like "they have now done, the kubooleut is not "good evidence in their case. They must, "independent of the kubooleut, and with-"out reference to it, show what was the "agreement between themselves, and in "what manner they held the land. It is "doubtful whether Radhanath was actu-"ally present before the zemindar; it was "Raj Narain who did all the work both be-"fore the Court and before the zemindar. "The kubooleut in the names of Raj Narain "and Radhanath is easily explained. Zemin-"dars generally like to have the names of "more than one tenant, for in that case they

"are more sure of recovering the rent; and "Raj Narain, who was involved in the re-"sumption-suit with the zemindar, was oblig-"ed to agree to any terms of the zemin-"dar." So that, having set aside the kubooleut as being no evidence in the case, the Subordinate Judge starts with another novel theory. Notwithstanding that the signature of Radhanath appeared in the kubooleut, he supposes that he was not a party to it, and that his name appeared, because zemindars like to have the names of more than one tenant in the kubooleut.

Again the Subordinate Judge says: "As "to the report of the Civil Court Ameen, who "was deputed to compare the land with the "plaint, butwarra, and the resumption-suit "boundary. But the Ameen's report is *ab* "*initio* no evidence, for the basis of his "report are the butwarra and resumption "papers, and I have already shown that the "butwarranama was not considered by the "parties themselves as an important docu-"ment," and so on. Now he first states that the Ameen was instructed to compare the land with the plaint, butwarra, and resumption-suit boundary, and then he says that, because the Ameen's report is based upon butwarra and resumption papers, therefore it is no evidence. Now an Ameen's report is by law evidence upon whatever materials it is based. Of course it will have more or less weight with the Court to which it is submitted according as the basis of it is more or less reasonable and valid, but to say that an Ameen's report is *ab initio* void, because it is based upon butwarra and resumption papers referred to him, is a *dictum* entirely unwarrantable. This being so, the judgment of the Court below appears to us to be perversely wrong. It is impossible for us sitting here in special appeal to substitute a finding of our own on the evidence for that of the Lower Appellate Court. Much as we may regret taking such a course, we can do nothing more than remand the case to that Court for a fresh finding on the evidence. If the Subordinate Judge who has twice decided this appeal had been at Tipperah, it would have been our duty to direct that the appeal should, in this case, be tried by another judicial officer. Under the circumstances, however, it is not necessary that we should make any order in that respect.

The 1st March 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G Birch, *Judges.*

Court Fees' Act (VII. of 1870), s. 12—Appeals Act VIII. of 1859, s. 36.

Case No. 998 of 1872.

Special Appeal from a decision passed b the Officiating Judge of Dacca, dated th 25th May 1872, affirming a decision o the Moonsiff of Nesragunge, dated th 27th April 1872.

Gunga Monee Chowdhrain (Plaintiff), *Appellant,*

versus

Gopal Chunder Roy and another (Defendants), *Respondents.*

Baboos Doorga Mohun Doss and *Chunde Madhub Ghose* for Appellant.

Baboos Romesh Chunder Mitter and *Kali Mohun Doss* for Respondents.

S. 12 of the Court Fees Act does not prevent party from appealing to the High Court under s. 3 Civil Procedure Code, and urging that the Court of fi instance was wrong as to the particular article of th schedule of fees by which the case was governed.

Mitter, J.—We are of opinion that th preliminary objection based on the provisio of section 12 of the Court Fees' Act must fa Of course it is not open to the appella under that section to dispute the correctne of the Moonsiff's finding on the question o valuation. But there is nothing in that sec tion to prevent him from appealing to th Court under the provisions of the 36th secti of the Code of Civil Procedure, and fr urging that the Moonsiff was wrong in hol ing that the case was not governed by t provisions of article 5, section 17, Schedu II. of the Court Fees Act.

We have heard the plaint, and we fe little hesitation in saying that no consequ tial relief has been asked for by it. All th the plaintiff prayed for was that it should b declared that the will propounded by h was a genuine and valid instrument, a that the Judge who decided the case un Act XXVII. of 1860 was wrong in arriv at a contrary conclusion. That no con quential relief of any kind whatever has be asked for is quite clear from the fact that plaintiff would not be entitled to execute t

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decree that might be passed in her favor on the plaint filed by her.

Much stress has been laid by the pleader for the respondent upon two cases, one reported in page 214, and the other in page 259, of the Weekly Reporter, Volume XVI. But it appears that the learned Judges who decided those cases held that the plaintiffs in those suits had actually prayed for certain consequential reliefs, and that, therefore, the plaints filed by them ought not to have been engrossed on a stamp of ten rupees only.

In the present case, no such relief appears to have been asked for, and we therefore hold that the lower Courts were wrong in rejecting the plaintiff's claim upon the grounds mentioned in their decision.

The suit is accordingly remanded to the Court of first instance for trial on the merits.

No order as to costs.

The 1st March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Ejectment—Tenant Rights.

Case No. 518 of 1872.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th December 1871, reversing a decision of the Moonsiff of Moteeharee, dated the 16th June 1871.

Shaikh Wallah Ali (Plaintiff), *Appellant,*

versus

Shaikh Golam Gous (Defendant), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Appellant.

Moonshee Mahomed Yusuf for Respondent.

A zemindar suing for ejectment, who admits that the defendant has been his tenant, cannot succeed upon any other ground than that the period of tenancy has elapsed or in some way terminated.

Phear, J.—It appears to us that the decision of the Court below is correct. The plaintiff sues to eject the ryot from his holding, admitting that he is a ryot, but alleging that he held only for a limited term of years under a pottah, and that that term had come to an end.

The defendant totally denies having given the kubooleut which the plaintiff states that he had given, and sets up that he had acquired a right of occupancy.

It appears that the plaintiff failed to prove the kubooleut; and on that ground the Lower Appellate Court has come to the conclusion that the plaintiff's claim fails.

It has been urged before us very forcibly that the defendant also failed to prove his right of occupancy, and that because he had set up this right against the plaintiff's claim, and had failed to prove it, therefore the plaintiff was entitled to recover immediate possession of the land.

It appears to us that there is no authority for this position. Neither the case reported in the 12 Weekly Reporter, page 404, nor that in the 2 Bengal Law Reports, page 128, seems to be in point. It is nowhere, as far as we know, laid down that a zemindar coming into Court, and admitting that the defendant has been his tenant, can succeed in ejecting him upon any other ground than that the period of tenancy has elapsed or in some way terminated. The plaintiff here only sought to prove one mode of termination of the tenancy, and in that he failed. It seems to us that there is nothing whatever in the case to afford even a suggestion in favor of the plaintiff upon any other ground The defence set up was not such as to relieve him from the obligation of proving his case, because it admitted the tenancy. We think the appeal must be dismissed with costs.

The 1st March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Maths—Mohunts—Succession—Inheritance.

Case No. 282 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 25th September 1871.

Gossain Dowlut Geer (Plaintiff), *Appellant,*

versus

Bissessur Geer (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee, Aubinash Chunder Banerjee,* and *Rughoobuns Sahoy* for Appellant.

Mr. J. T. Woodroffe, Baboo Mohesh Chunder Chowdhry, and *Moonshee Mahomed Yusuf* for Respondent.

The general principle regulating the devolution of property belonging to a math, on the death of the mohunt, is that a virtuous pupil takes the property. In some instances the mohuntship descends to a personal heir, and in others to a successor appointed by the existing mohunt; but the ordinary rule is that maths of the same sect in a district, or having a common origin, are associated together, and on the occasion of the death of one mohunt, the others assemble to elect a successor, either out of the disciples of the deceased, or from those of another mohunt.

Phear, J.—A FEW prefatory words are necessary to explain the view which we take of the present condition of this case.

In most of the many sects into which the followers of Hinduism are divided, there apparently exists a clerical class, which is commonly separated into two orders, namely (in European phraseology), the monastic or ascetic and the secular. The first of these is celibate, and in a great degree erratic and mendicant, but has anchorage places and head-quarters in the maths. The typical math consists of an endowed temple, or shrine with a dwelling-place for a superior (the mohunt) and his disciples (chelas). The endowment of a math* is either the result of private dedication, or is a grant made by, and the institution itself is a kind of offshoot from, an already existing wealthy math. The property is not generally very large, though in exceptional cases it is so; and in some maths the mohunts either by decline from the strict path of sanctity originally marked out for them, or even in prosecution of the founder's purpose, make the acquirement of wealth by trade their great object. And where the math professes any special element of popularity, the daily offerings and alms given by the pious in the shape of rice, dál, plantains, &c., afford alone a sufficient source of maintenance. By devoting himself to a religious life, the mohunt probably severed himself from all such worldly possessions as he might otherwise be entitled to as an ordinary member of society. He became thenceforward theoretically dead to the world. And even if he afterwards irregularly continues in the enjoyment of such property, it would, on his actual death, go to his personal heirs (S. D. A., 1853, page 1089). But it is otherwise with regard to the property of the mohuntship or math. The Hindu law recognizes a special devolution of the property belonging to a math upon the occasion of the death of the mohunt. The general principle applicable to different cases of religious devotees is to be found in the Mitakshara, Chapter II., section 8, slokes 1-6, and the reason for it is somewhat quaintly explained in slokes 7 and 8. The principle, however, so far as it affects *maths*, is shortly this, namely, "a virtuous pupil takes the property." And the same maxim of law is given in the Vyavahara Mayukha, Chapter IV., section 8, clause 2; Dayabhaga, Chapter IX., section 6, sloka 35; and Colebrooke's Digest, Book V., Chapter VIII., section 2, text 458—all these commentaries attributing the original precept to Yajnyavalcya. But the particular mode in which the *virtuous* pupil, *i. e.* not merely a chela, but a shishya, fittest to succeed, is ascertained or selected is matter either of express direction on the part of the founder or of custom in the case of ancient foundation. (See cases quoted at length in Shamachurn Sircar's Vyavastha Darpan, page 327, *et seq.*; and Marsh., page 580). There are instances of maths in which the mohuntship descends to a personal heir of the deceased; and others in which the existing mohunt alone appoints his successor (Greedharee Doss *vs.* Nunkishore Doss, Marsh., 573), but the ordinary rule is that the maths of the same sect in a district, or maths having a common origin, are associated together—the mohunts of the same acknowledging one of their number (who is for some reason pre-eminent) as a head; and on the occasion of the death of one, the others assemble to elect a successor out of the chelas or disciples of the deceased, if possible—or if there be none of them qualified, then from the chelas of another mohunt. After the election the chosen disciple is installed in the guddi of his predecessor with much ceremony (Religion of Hindus, H. H. Wilson, page 51).

In the present case the plaintiff by his guardian alleges in substance that he is the duly-constituted successor to one Buldeo Geer, deceased, lately mohunt of Math Rattanpoora. He complains that the defendant wrongly obtained a certificate of administration of the math property on the death of Buldeo Geer, and he seeks to recover that property from him. The defendant denies that the plaintiff is rightful successor to Buldeo Geer as alleged. It appears that several successions to the mohuntship of Rattanpoora have taken place within a not very lengthened period of years, but no evidence has been given by either party tending to show any rule according to which

* The meaning of the word math seems to be cell of a hermit.

appointment or selection of the successor each occasion has in fact been made.

In form, the main issue which has been med between the parties is exceedingly iple, namely, "Is the plaintiff the chela disciple of the late Buldeo Geer," and this s not, at first sight, seem to necessitate an uiry as to the proper mode in which uccessor to the mohuntship should be stituted; and no such inquiry has been de at this trial. Yet a little consideration ds to the conclusion, that the parties disputing not only as to whether the ntiff was ever made a chela of Buldeo r at all, but also as to whether, if so de, he was made or had become such a a as to be entitled to succeed his late ter in the mohuntship.

ndeed, the first and principal question ch appears to arise in this suit is, t, if any, is the rule prescribed by the der of the math; and if none, what is custom or usage followed at this math regard to the selection and appointment successor to a deceased mohunt. Until is judicially ascertained (for the ies are not in accord with regard to it), eems useless to inquire into the facts of tion which occurred. But no issue to effect has been expressly framed between parties. Nor has any such issue in substance tried in the Court below. d the evidence on the record is not icient to enable us to determine the ques-. Under these circumstances, we think ght to put the above question into the n of an issue for trial by the lower urt, and we refer the same to that Court. er the trial of the issue, the lower Court return its finding on the issue to this urt together with the evidence.

The 3rd March 1873.

Present:

e Hon'ble J. B. Phear and W. Ainslie, *Judges.*

dence—Omission—Mokurruree Tenure—Res Judicata—Jurisdiction.

Case No. 288 of 1872.

cial Appeal from a decision passed by e Judge of Tirhoot, dated the 29th une 1871, reversing a decision of the Moonsiff of Mozuffurpore, dated the 22nd ebruary 1871.

Meer Babur Ali and another (Plaintiffs), *Appellants,*

versus

Sheikh Dowlut Ali and others (some of the Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Respondents.

In a suit to hold certain lands on a mokurruree tenure, the Lower Appellate Court was of opinion that plaintiff would have established his case but for his omission, on a former occasion, when examined as a witness in a suit between third parties, to make any mention of the mokurruree:

HELD that the Judge had given undue importance to the omission which occurred under circumstances not naturally or necessarily calling for mention of the mokurruree:

HELD that the fact of this mokurruree tenure, when previously set up by this plaintiff in answer to a rent-claim, having been disbelieved by the Collector, did not constitute a *res judicata*, as between the parties with regard to the mokurruree right, which the Collector had no jurisdiction to determine, except incidentally.

Phear, J.—IN this case the Lower Appellate Court expresses its opinion that the plaintiff has established his case, unless a statement which he made upon oath on a former occasion is to be taken against him. In that event, however, the Judge is of opinion that that statement weighs so heavily against his present claim as to oblige the Lower Appellate Court to dismiss it.

The Judge has received this evidence, and, according to this view, dismissed the plaintiff's suit.

The essence of the whole matter is shortly this, namely: That, in the present suit, the plaintiff claims to hold certain land on a mokurruree tenure, and on the former occasion when he was examined as a witness in a suit for assessment of mesne-profits between third parties, he stated various facts with regard to the land which he then cultivated and still cultivates, but omitted to say anything about holding any portion of it on a mokurruree tenure. The Judge thinks that his omission on that occasion to say anything of the mokurruree raises so strong an inference, that he had not at that time any mokurruree as to overweigh the whole of the case which he has been able to make in this suit in support of this mokurruree.

It appears to us that the Judge has given an undue importance to the omission in the plaintiff's former statement of any mention of the mokurruree. The circumstances under which that statement was made do

not appear to have been such as necessarily or naturally to call for such mention. Indeed, if he had mentioned it, there might, we think, have been some reason to say that he was stating facts which were irrelevant to the purpose of his examination, and possibly doing so for some ulterior purpose. It is rather hard upon him that, because he did not say that which it does not now appear there was any cause for him then to say, therefore his present claim, which is, as the Judge says, otherwise satisfactorily made out, should be dismissed.

It has further been urged in support of the judgment of the Appellate Court, that this matter of the mokurruree has already been finally adjudicated upon by a competent Court, for it appears that, on a former occasion, the present defendants brought a suit against the present plaintiff for arrears of rent, and in answer to the claim so made, the present plaintiff set up this very mokurruree tenure now in question, and it was disbelieved by the Collector. It seems to us, however, that that fact does not constitute a *res judicata* as between the parties with regard to the mokurruree right. The only thing that the Collector in strictness adjudicated was that a certain amount of rent was due at that time from the present plaintiff to the present defendant. He had no jurisdiction to determine the question of mokurruree right between the parties otherwise than so far as it might be incidental to the question of rent due or not due, which was before him.

On the whole, then, it seems to us that the Lower Appellate Court has committed an error in reversing the decision of the first Court for the reason which it has given. We think the appellant ought to succeed, and the decree of the Lower Appellate Court should be reversed with costs.

The 4th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Ijmalee Property—Joint Liability—Mesne-profits—Execution.

Regular Appeals from a decision passed by the Subordinate Judge of Tirhoot, dated the 24th January 1871.

Case No. 52 of 1871.

Ajoodhya Doss (Plaintiff), *Appellant,*

versus

Lalljee Paurey (Defendant), *Respondent.*

Messrs. C. Piffard and *C. Gregory* and *Moonshee Mahomed Yusuf* for Appellant.

Baboos Nil Madhub Bose, Bhowanee Chu Dutt, Luckhee Churn Bose, and *Boo Sen Singh* for Respondent.

Cases Nos. 97 and 102 of 1871.

Jhoonkee Paurey and others (Defendants) *Appellants,*

versus

Ajoodhya Doss (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboos Rom Chunder Mitter* and *Nil Madhub B* for Appellants.

Mr. C. Piffard, Mr. C. Gregory, and *Mo shee Mahomed Yusuf* for Respondent.

In a suit to recover possession of land from ijmalee enjoyment of which plaintiff had been cluded by the joint action of all the defendants who divided the property between themselves, HELD that defendants were all equally responsible for the dam sustained by the plaintiff, and that none of them c restrict their liability for mesne-profits to that par only of which they were in possession.

HELD that the plaintiff was entitled to obtain mes profits up to such time as he should get real and stantial possession of the property at the hands of defendants, in execution of his decree.

Phear, J.—WE think that Mr. Piffar contention is founded upon a correct ba and that the amount of wassilat forme awarded to his client must be restored.

The particular objections which have be raised by Baboo Romesh Chunder Mitter appeals Nos. 52 and 102, on behalf of t maliks of putee 20 must, we think, fa The substance of the case is, that all t defendants, together by their joint acti excluded the plaintiff from ijmalee enjoyme of the land. They divided the prope between themselves to the exclusion of t plaintiff, and it is the result of th division made under those circumstances, th Baboo Romesh Chunder Mitter's clients a now in exclusive possession of putee No. 2 and have nothing to do with the rest of t property. It seems to us that it is in so degree a fallacious argument to say that, b cause they are thus only in possession of portion of the property, it is only in respe of that portion of the property that they a liable to the plaintiff for mesne-profits. W

k that they have clearly by the action y have taken in the matter, shut the ntiff out from the enjoyment of his unded share of the whole property; and as as he is concerned, they must be held ally responsible with the rest of the deants for the damage which he has there-sustained. And as to the plea that the ntiff's cause of action is barred, it appears s that this really amounts, when looked , to an objection that the Court below has n a larger sum of money in respect of ages for a cause of action which was not ed, than it should have done. It is pos-e that in the estimate of the mesne-profits the enjoyment of which the plaintiff been excluded during the period of limit-n, the lower Court has given some item oneys and profits which might have, in got into the defendant's hands at some antecedent to that period. But there thing brought to our notice which shows that actually was the case. And it is, ink, quite as probable, if not more so on facts which have been disclosed, that the ndant actually received this particular of money within the period of limita-And at any rate it does not appear to at we should be doing right when we alled upon in regular appeal to assess damages caused to the plaintiff by the gful acts of the defendants—that we d be doing right to look very narrowly the evidence bearing upon such a point is for the purpose of cutting down the nt which the lower Court has arrived the proper assessment of damages. It rtain that the item which it is said the Court has wrongly taken into account, use it was barred, was an item of money ging to the plaintiff, wrongly appro-ed by the defendants.

was further objected that the plaintiff ot claim mesne-profits for the period of following after Sawun 1271, because he ossession of the property in execution s decree at that date. But it appears he did not get actual enjoyment of the erty. The utmost that happened was, the officer of the Court put him into al possession, and the very officer who so says that the ryots were prevented he act of the defendants from paying rents to the plaintiff. It seems to us he defendants cannot rightly be allowed y that that which was wrongful before decree was rightful after the decree, and really would be the effect of our uphold-is part of Baboo Romesh Chunder's argument. It seems to be the fact that the plaintiff has not been able to get possession of the land by reason of the conduct of the defendants. As we understand the course of this suit, the plaintiff is entitled to obtain mesne-profits up to such time as he should get real and substantial possession of the property at the hands of the defendants. He clearly did not, according to any evidence placed before us, get such possession. It lay upon the defendants to give him possession and enjoyment, and if they have done so, they could very easily prove the fact. There cannot be any doubt, as we apprehend, that the contrary is the case. On the whole, then, it seems to us that these objections fail.

The plaintiff's appeal No. 52 of 1871 is decreed with costs, and the defendants' appeals Nos. 102 and 97 of 1871 dismissed with costs.

The 5th March 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Act VIII. of 1859, s. 269—Execution-sale—Encumbrances—Pleadings.

Case No. 303 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Dinagepore, dated the 29th August 1872.

Sharoda Pershad Mullick, manager on behalf of Sreenath Sandyal, a lunatic (Decree-holder), *Appellant,*

versus

Roy Dhunput Singh Bahadoor (Judgment-debtor), *Respondent.*

Mr. J. T. Woodroffe and *Baboos Unnoda Pershad Banerjee* and *Ram Churn Mitter* for Appellant.

Messrs. G. C. Paul and *R. T. Allan*, and *Baboos Sreenath Doss, Rash Beharee Ghose*, and *Gooroo Doss Banerjee* for Respondent.

M obtained a decree against J, and, in execution, attached and sold his lands which were bought by the decree-holder. The sale was confirmed, and writ of possession directed. After the decree, but prior to attachment, the original judgment-debtor had executed and registered a putnee pottah for a 3-annas share of one of the zemindaries in dispute, and granted it to D, who having objected under s. 246, Civil Procedure Code, to the above sale, an order was made that, at the time of the auction-sale, it should be proclaimed that D claimed a putnee right. This was accordingly done.

Before M was put into actual possession, she was required to find security. Delaying to do this, the lands were attached and sold under a judgment obtained by others who purchased and entered on possession. M having furnished security, petitioned to be put in possession; but her petition was rejected. She then brought a suit to cancel the order refusing her possession. In her plaint, she claimed khas possession; but did not refer to the putnee claimed by D. Her plaint was decreed, the decree was appealed, and it was finally upheld by the Privy Council; but, throughout the litigation, no issue was raised as to the putnee. In proceeding to execute the decree, M claimed actual possession. Before process had been issued, D objected to khas possession being given of his putnee mouzah. The Sub-Judge ruled that the objection fell within the spirit of Act VIII. of 1859, s. 269:

HELD that s. 269 did not apply, inasmuch as no attempt had been made to deliver possession; but that jurisdiction was not therefore barred:

HELD that the only intention of the decree was to confirm plaintiff in the position which she occupied when the property was sold in execution of her original decree, after proclamation of D's claim, and that she was not entitled to khas possession:

HELD that, if plaintiff wanted a declaration as to the invalidity of the alleged putnee, she ought to have stated her intention unambiguously in her plaint.

Pontifex, J.—THIS is a regular appeal in the execution department. The earlier facts of the case are shortly stated in the judgment of the Privy Council delivered on the 3rd of February 1872 in the suit as follows:—

Mookta Keshee Debee, the manager of the estate of her husband, a lunatic (of which the appellant is now manager), obtained a decree (30th July 1861) in the Zillah Court of East Burdwan against Judoo Nath Sandyal for upwards of two lakhs of rupees.

Proceedings were taken to obtain execution of the decree on the defendant's property within the jurisdiction of the Zillah Court of Dinagepore.

In March 1864, a certificate and other papers were sent by the Judge of East Burdwan to the Judge of Dinagepore, and sometime afterwards, the Judge of Dinagepore attached the lands of the defendant in his zillah, which formed the subject of the suit, and against which execution is now sought.

On the 24th of June 1865, another certificate was sent from the Judge of Burdwan, and, on the 4th of September 1865, the lands of the defendant were sold under the decree to Mookta Keshee Debee, the decree-holder, and by an order of the Judge of Dinagepore of the 4th of December 1865, the sale was confirmed, and a writ of possession directed.

It is necessary here to interpose certain facts which were not brought to the notice of the Privy Council.

Konuck Monee, the original judgment-debtor, had executed a putnee pottah, dated and registered the 16th of December 1861, whereby a 3-annas share of one of the zemindaries in dispute was granted in put to the defendant Dhunput Singh, who is of of the respondents in this appeal.

This putnee pottah was executed after decree obtained by Mookta Keshee Debee the Court of East Burdwan, but prior to attachment under such decree of the ju ment-debtor's estate in Dinagepore.

In the judgment in execution now appe from, it is stated that "there are oral "documentary proofs to show that Dhu "Singh has ever since been in possessio "the putnee." However this may be, D put Singh objected under section 246 to sale under Mookta Keshee Debee's dec and an order was made on such objecti and dated the 2nd of September 1865, days prior to such sale. That order w has been read to us was in these wo "At the time of auction-sale, let it be claimed that Dhunput claims a putnee rig

At the sale referred to by the Privy Co cil, such proclamation was accordingly m

Resuming the statement in the judgm of the Privy Council, it appears that Judge of Dinagepore, in pursuance of order of the Judge of Burdwan, requ Mookta Keshee Debee to give security the proceeds of the sale before he w allow actual possession to be given to Several months elapsed before she found security, and meanwhile the present resp ents, by orders of the Zillah Judge Dinagepore, obtained attachment and sa the same lands under a judgment obta by them against the same debtor; and on 6th of January 1866, the lands were sol execution of their decree, and purchase themselves, and possession afterwards g to them.

On the application by the respondents possession under their purchase, the ap lant objected, but the Judge of Dinagep on the 19th of June 1866, made an o directing possession to be given to the spondents. Subsequently, the appellant ing furnished sufficient security, petitio the Court of Dinagepore to be put in po sion under her purchase of the 4th of S tember 1865. But, on the 28th of Decem 1866, the Judge of Dinagepore rejected petition on the ground that possession already been given to the respondents by order of the 19th of June 1866.

Under this state of circumstances, appellant instituted the suit in the execu stage of which this appeal arises.

The appellant, although she must had complete notice of Dhunput Sin

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im to the putnee, and of the order of the of September 1865 directing proclamation of such claim to be made at the sale at ich she purchased, did not by her plaint k to impeach the putnee, or to set aside order of the 2nd of September 1865. e did claim possession by setting aside the lers of the 19th of June and 28th of cember 1866, and stated in her plaint that as in consequence of the order of the h December 1866 that her suit was inted to cancel the same, and she expressstated that her cause of action accrued the 28th of December 1866.

It is true that in her plaint she states that suit was brought for khas or direct possion, but not the slightest reference is le to the putnee claimed by Dhunput gh.

The plaint was filed on the 8th of Feby 1867; and on the 23rd of March 1867, ten statements were put in on behalf of plaintiff and the respondents respectively. n her written statement, the plaintiff did de to Dhunput Singh's claim to a putnee to his objection in 1865, under section , and stated that "the objection having n rejected, the sale was effected," which certainly not a true description of the er of the 2nd September 1865.

At the end of the written statement, the ntiff stated in a vague way "that the said jections based upon fraud and chicanery ere rejected. Therefore, I am fully enled to obtain khas possession."

The pleaders of both parties were examinon the 25th of March 1867. The plaintpleader did not refer to the putnee, but ted that his client purchased "the right" the judgment-debtor "in the zemindaree suit," and after referring to the order of 28th of December 1866, stated that the was to set aside that order, and thus to ain khas possession.

No issue was raised as to the validity of alleged putnee; only one issue was led on the 25th of March, namely: "Can e summary orders of 19th of June and 8th December 1866 be annulled, the laintiff's purchase upheld, and she placed n possession."

The case was then adjourned until the th of April, when the parties were required adduce all their proofs.

The decree dated the 11th of April 1867 ites the order of the 28th of December 66, and that "hence this suit for khas ect possession," and ordered "that the uit be decreed in favor of the plaintiff; "that the two summary orders of the 19th "of June and the 28th of December 1866 "be set aside; that the female plaintiff's "purchase to the extent of the properties "purchased by her stand good; that she do "get possession of the said properties." This decree was reversed by a Division Bench of this Court, but the Privy Council, in the judgment before referred to, reversed the last-mentioned decree, and directed that the decree of the 11th of April 1867 should be executed.

Throughout the whole course of the litigation, it is clear that, except in a very imperfect way in the plaintiff's written statement at a date when the respondents could not take any notice thereof in reply, no issue was raised, no evidence taken, nor any reference whatever made to the alleged putnee. The claim was a claim for possession of a purchased share of zemindaries. The suit was valued as one for the zemindary title, that is to say, at three times the sudder jumma; such valuation would not cover the putnee which bore a high rental, and for which a bonus was paid, and the only apparent object of the suit was to place the parties in the same position as if the orders of the 19th of June and 28th of December 1866 had never been made; and as if the sale of September 4th, 1865, at which the proclamation was made of the claim to the alleged putnee had been in due course confirmed.

In proceeding to execute the decree of the 11th of April 1867, as directed by the Privy Council, the appellant claimed to be put into actual possession of the shares in the zemindaries which had been the subject of the suit.

Upon the filing of appellant's application, and before any process had been issued by the Court, Dhunput Singh presented a petition ojecting to khas possession being given to the appellant of the mouzah affected by his alleged putnee.

The appellant objected that Dhunput Singh had no right to object or intervene, but the Subordinate Judge ruled that the objection fell within the spirit of section 269 of Act VIII. of 1859, and therefore that he had jurisdiction to entertain it.

It has been objected before us that that section only applies after an attempt to deliver possession, and then only in the case of parties who are not defendants.

There is, no doubt, force in the first branch of this objection that section 269 could not apply, inasmuch as no attempt had been

made to deliver possession; but because section 269 does not apply, we do not see that it follows that the Court had not jurisdiction to inquire into and decide the question raised by Dhunput Singh in opposition to the plaintiff's application for khas possession. Such inquiry was, in fact, only anticipating the inquiry which must ultimately have arisen under section 226, and we therefore consider the objection on this ground to the judgment appealed from untenable. But on the merits, it has been argued that the use of the words "*khas or direct possession*" in one part of the plaint, and in the plaintiff's written statement, and in the recitals in the decree of the 11th of April 1867; that the words in the ordering part of that decree "*that this suit be decreed* in favor of the plaintiff;" and that the words in the judgment of the Privy Council "that the Judge required Mookta Keshee Debee to give security for the proceeds of sale before he would allow *actual possession* to be given to her," combine to show that actual possession was intended to be given to the plaintiff to the exclusion of the alleged putnee of Dhunput Singh.

We are of opinion, as we have before observed, that the only intention of the decree of the 11th of April 1867, and of the Privy Council, was to confirm the plaintiff in the position which she occupied on the 4th of September 1865, and we have no doubt that the conclusion arrived at by the Subordinate Judge in the decision now appealed from was correct. But, irrespective of intention, it has been further argued as a matter of pleading that Dhunput Singh as a defendant was bound to bring forward his whole case in respect of the matter in litigation, and is not now entitled to insist upon his alleged putnee, as he neglected to put it forward in his defence. In support of this objection reference was made to the cases reported in 11 Moore's Indian Appeals, pages 61 and 73; 8th Weekly Reporter, pages 307 and 366; 12th Weekly Reporter, page 80; and 18th Weekly Reporter, page 162. But we are of opinion that those decisions do not apply to the present case. To hold that they necessarily applied would be to beg the question now in dispute. What was the nature of the case, the defendants were called upon to meet? And what was the effect of the decree of the 11th of April 1867? The applicability of the cases cited depends entirely on the plaintiff's cause of action, and it would obviously be inconvenient as well as multifarious that separate causes of action against different defendants should be combined and decided in the same suit. But even putting aside the question of multifariousness, if the plaintiff wanted a declaration as to the invalidity of the alleged putnee, of which she had complete notice, it was her duty to state her intention unambiguously in her plaint.

We think that the defendant Dhunput Singh was, by the form in which the plaintiff stated her case, led to believe that the only subject of the litigation was whether the sale to the plaintiff, or the sale to the defendants, should have the preference. He had, on the 2nd of September 1865, challenged her right to do anything in detriment of his alleged putnee; she had bought at a sale where his alleged right to a putnee was proclaimed; and she not having raised in her plaint any question with respect to the putnee, and having asked only that the orders of the 19th of June and 28th of December 1866 should be set aside, and having only valued her suit as one for the zemindary title as shown above, was content to take a decree declaring that her purchase to the extent of the properties purchased by her should stand good.

Under these circumstances, we are of opinion that the appellant is not entitled to khas possession of the lands comprised in the alleged putnee, unless she can set the same aside for any reason as invalid against her.

In her grounds of appeal the appellant has mentioned that any suit by her now to set aside the putnee would be barred. Without expressing any opinion upon this we think that the appellant has only herself to blame if such a suit is barred.

We reject this appeal with costs.

The 6th March 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Special Appeals—Misconstruction of Documents—Act VIII. of 1859, s. 372.

Case No. 850 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 31st January 1872, reversing a decision of the Moonsiff of Mudhapore, dated the 7th September 1871.

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wbut Singh and others (some of the Defendants), *Appellants*,

versus

ttur Dharee Singh and others (Plaintiffs), *Respondents*.

boos Sreenath Doss and *Mohinee Mohun Roy* for Appellants.

oo Mohesh Chunder Chowdhry for Respondents.

misconstruction of a document which is the found- of the suit, being in the nature of a contract or ument of title is allowed to be a ground for special al, although not named in Act VIII. of 1859, s. 372. special appeal does not lie because of a mistake as meaning of some portion of the evidence which riting, if it is connected with other evidence affect- constructions.

ouch, C.J.—THERE has been no miscon- tion here of the *ekrarnama*. The question is one of fact, namely, whether property, a share of which the plaintiff ns, was taken by the defendant in satis- on of a portion of the money which is tioned in the *ekrarnama*. If the plaint- was entitled by the *ekrarnama* to a e of the money, he would be equally en- d to a share of the property which was instead of it. It would make no rence whether payment was made by s of property or by means of money. Judge (this being a question of fact for to decide) says: "It is evident and ar that the sale in question was made the satisfaction of the aforesaid amount the former balance," and gives as a reason defendants are totally unable to show as how the said amount of former balance entioned in the *ekrarnama* was realized, d unable to show as well that the plaintiff d not obtain their two shares."

s we understand it, the case for the de- ants is, that this property was purchased some other money which was realized he defendants; we put a question as to t had become of the balance mentioned he *ekrarnama*; if that had been realized t had the defendants done about it. The ge might fairly infer, from their being ble to show a realization of that portion ny other way, that the property of which plaintiff claimed a share was taken for balance. It is clear he did not found his clusion merely upon the petition, but upon circumstances of the case, and the ab- e of any evidence of that description the defendant. So, although he may, apparently did misread the petition, he does not found his finding of fact upon it. In a subsequent part of his judgment, he alludes to the petition, but his having made a mistake, if he has in fact made one, regarding the meaning of it, is not a ground for us to set aside his decision upon a question of fact which he so distinctly found in the first part of his judgment.

We would have it understood that a special appeal does not lie, because some portion of the evidence may be in writing, and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which a special appeal will lie if it is connected with other evidence affecting its construction. The misconstruction of a document which in the foundation of the suit, which is in the nature of a contract or a document of title is allowed to be a ground for a special appeal, although it is not named in section 372 of Act VIII. of 1859. The appeal must be dismissed with costs.

The 6th March 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Hindoo Law—Joint Family—Separate Acquisition—Benamee Purchase—Act I. of 1845, s. 21.

Case No. 330 of 1872.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 29th September 1871, affirming a decision of the Moonsiff of Sasseeram, dated the 27th June 1871.

Bukshee Booniadi Lall (Defendant No. 1), *Appellant*,

versus

Bukshee Dewkee Nundun Lall (Plaintiff), *Respondent*.

Baboo Kalee Kishen Sen for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

Property purchased by a member of an undivided family with money belonging exclusively to himself, is his separate acquisition in which the other members are not entitled to share.

Property purchased by a member of a joint family with money out of the common estate, is family-pro-

perty, even if purchased in the name of his son. Even if the son is a certified purchaser at a sale under Act I. of 1845, the other members of the family are not debarred by s. 21 from claiming a share of the purchase as joint property.

Couch, C.J.—THIS was a suit brought to recover a one-anna share in certain property which had been purchased at a sale under Act I. of 1845, by one Chundun Lall in the name of his son, the defendant Booniadi Lall.

The issues recorded by the Moonsiff are:—

Issue, 1st.—Has the plaintiff's claim been properly valued according to clause 5, section 7, Act VIII. of 1870?

2nd.—When the name of Booniadi Lall is entered in the certificate of sale, will this case be admitted under section 21, Act I. of 1845 or not?

On Limitation.

3rd.—Previous to the institution of suit was the plaintiff in possession of the litigated property within 12 years or not, if not, does limitation apply to the suit?

Issues of fact.

1st.—Was the litigated property acquired by Booniadi Lall from his own private funds, or by Chundun Lall, the common ancestor of both parties?

2nd.—Was the litigated property in possession of the plaintiff's ancestor up to 7th Sawun 1269 F. S., and is the plaintiff out of possession from that date or not?

Upon these he found that the purchase was made when Booniadi Lall was being with his father, and the money was paid by Chundun Lall, and that he was in possession, and gave a decree to the plaintiff.

The defendant Booniadi Lall appealed, and the case was heard by Mr. Elliot, the Judge of Shahabad, who dismissed the appeal. His reasons for doing so may be gathered from the latter part of his judgment, which seems to have been hastily written. He says: "Plaintiff has given oral evidence, as "also certain other of the defendants; and "that of defendant 2 confirms it that Chun-"dun Lall, the ancestor, did enjoy the rents "and profits of the estate in suit, and that "they have since, up to the death of Chundun "Lall, joined in that benefit. The examina-"tion of those witnesses has been made on "four special points, and it is shown, *1st*, that "Chundun Lall did enjoy the property "during his life. Plaintiff, defendants 3—5, "Madho Pershad, and defendant 2, to his "enjoying it for six months after purchase, by "which latter it is clear that there was no "enmity between defendant 1 and Chundun "Lall at that time, and that they were no "separated as defendant 1 states; *2nd*, ex-"cept the evidence of defendant 1 and de-"fendant 2, Ram Golam, defendant 1st's wi-"ness on this remand, there is no evidence o "separation of property or of anythi "beyond separation in food.

"*3rd.*—That the final separation of th "family did not take effect till after the de "of Chundun Lall; and *4th*, it is proved b "the oral evidence of plaintiff, defenda "3, 4, and Madho Pershad that the plaint "and they have enjoyed the profit of th "estate in suit.

"Under all these proofs, I think it w "incumbent on the defendant 1 to ha "shown by undeniable proofs that he pu "chased the property in suit from his o "funds, and not having done so that the low "Court's order of the 27th March 1871 "correct, and that this appeal must be di "missed with costs and interest at 6 per ce "per annum."

The question upon section 21 of Act I. 1845 is not noticed.

Upon the argument of the special appe the objection principally relied upon was th certificate of purchase was conclusive, a by section 21 of Act I. of 1845, the could not be maintained. But it was also o jected that the plaint stated that the mo with which the property was purchased b longed exclusively to Chundun Lall. If it d the purchase would be a separate acquisiti by him in which the other members of t family were not entitled to share.

"A member of an undivided family co "taining such, and enjoying in common w "his co-heirs every advantage incident "their unseparated state may in the meanti "acquire separate property to his own pa "ticular use, in which, upon a division, th "will have no right to share."—Stra H. L. 213.

As the plaint was found to contain th statement, which was an admission by t plaintiff that might be fatal to his case, it w necessary that the question whether t Rs. 2,500. the consideration for the pu chase was the self-acquired property of Chu dun Lall or the produce of ancestral est should be determined. This question ha not been considered by either of the lowe Courts.

It has now been found that the purchase money came out of the common estate, a not from any separate or personally acquire property of Chundun Lall. Mr. Elliot say it was not plain to him what was the cau

r a remand, for the family being joint and divided, it seems immaterial whether the ate in suit was purchased by Chundun Lall n ancestral or acquired property. This ms entirely to ignore the power of sepa- acquisition by a member of an undivided ily. Possibly what is meant is that the arate property of a member of an undi- d family ceases to be so when used in the chase of land.

he question we have now to decide is ther the suit is barred by section 21 of I. of 1845. This section differs from ion 260 of Act VIII. of 1859 only in , that in the former the words are "any brought to oust the certified purchaser," in the latter "any suit brought against certified purchaser." In Greesh Chunder oree *vs.* Mussamut Bhugobutty Debia,* Moore I. A. 419, the case of the ap- ant was that lands, though purchased in name of a wife, were purchased by her band with his own funds, and formed part is estate, in which, under his will, she had a life-interest. The Judicial Committee they desired to state in particular that were not satisfied that the 20th and 21st ions of Act No. I. of 1845 raised a pre- ption of law fatal to the case of benamee chase set up by the appellant.

the present case there is a greater rea- for not allowing the sections to have that t. The purchase was made by Chundun by means of the common property. The r members of the family could not be ived of their rights by his making it in on's name. It is as much family pro- y as if the purchase had been in the e of Chundun Lall. In Mussamut uns Koonwar *vs.* Lalla Baharee Lall, the cial Committee, on the 2nd March 1872, that the construction of section 260 t not to go beyond what the language of ports. What section 21 prohibits is a by Chundun Lall to oust his son Booniadi, it may be also a suit by any other sons ming a share of the property as being the rate property of Chundun Lall. It does prevent the other members of the family ming a share of it as joint property. The al must be dismissed with costs.

The 7th March 1873.

Present:

Hon'ble Sir Richard Couch, *Kt., Chief ustice*, and the Hon'ble F. A. Glover, *udge.*

Lease—Local Customs.

Case No. 961 of 1872.

Special Appeal from a decision passed by the Commissioner and Judge of Cooch Behar, dated the 2nd April 1872, reversing a decision of the Officiating Deputy Commissioner and Subordinate Judge of Julpigooree, dated the 12th October 1871.

Pran Kishen Doss and others (some of the Defendants), *Appellants,*

versus

Nefaroo Mahomed Duffadar (Plaintiff), *Respondent.*

Baboos Ashootosh Dhur and *Kishen Dyal Roy* for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondent.

The right conferred by a lease to hold from a certain period cannot be controlled by such a custom as that the cutting of timber does not begin until Kartick.

Couch, C.J.—It is clear from the reference in the lease to the previous lease, and the statement that it is to commence from the expiration of the previous lease, that the lease to the plaintiff was to commence on the 1st of Bysack. That would give him a right to the possession.

It might have been set up that there was a custom that the year in this district, or in contracts of this nature, commenced in Kartick. But that is not what was attempted to be shown. The custom alleged was that the cutting of the timber did not begin until Kartick. The right which was conferred by the lease could not be controlled by a custom of that kind, the lease being made to commence from a certain period.

Then with regard to the other objection, that it is not found that the defendants dispossessed the plaintiff, that does not appear to have been raised by the issues. According to them, it seems to have been admitted that the defendants did dispossess to some extent. The only question raised was what was the amount which they had collected. We cannot allow the other question to be raised in special appeal.

The appeal must be dismissed with costs.

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* 14 W. R., P. C., p. 7.

The 7th March 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Execution—Trust Property.

Case No. 876 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 15th February 1872, affirming a decision of the Sudder Moonsiff of that District, dated the 16th March 1871.

Moheeput Singh (one of the Defendants), *Appellant*,

versus

Shaikh Etbaree Chowdhry (Plaintiff), *Respondent*.

Baboo Doorga Dass Dutt for Appellant.

Baboo Boodh Sen Singh for Respondent.

Property placed in trust with parties as managers, but not beneficial owness, is not liable to be taken in execution of a decree against them.

Couch, C.J.—THERE was no doubt that the property had at one time belonged to the plaintiff. The only question was whether the plaintiff had parted with the share in question in this suit to his sons. If it had become the property of the sons, it was liable to be taken in execution of the decree against them; if it had not, it could not be. What the defendant, who had purchased at a sale in execution of the decree, relied upon was a petition to the Collector for mutation of names. There is no other instrument which could be said to amount to a gift, nor was it suggested that there was any other. The Moonsiff decided that the word used in the petition, *supoord*, does not mean an alienation amounting to a divesting of right, but a placing of property in trust; and the Subordinate Judge, on appeal, was of the same opinion. Nor has it been shown to us to-day that that is a wrong construction of the terms of the petition. The plaintiff seems to have intended to put the property in the names of the sons in order that they should have the management of it, he continuing the beneficial owner. That being the case, we must dismiss the appeal with costs.

The 7th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges*.

Execution—Costs—Limitation.

Case No. 251 of 1872.

Miscellaneous Appeal from an order pass by the Judge of Tirhoot, dated the 1 May 1872, reversing a decision of Moonsiff of Durbhangah, dated the 2 December 1871.

Baboo Nath Jha and others (Judgment-debtors), *Appellants*,

versus

Khugput Doss (Decree-holder), *Respondent*.

Mr. C. Gregory for Appellants.

Mr. M. L. Sandel and *Baboo Bhowan Churn Dutt* for Respondent.

Having obtained possession of property in satisfact of a decree, the decree-holder had to meet proceedi initiated by a third party under Act VIII. of 1859, s. and delayed to execute his decree as far as it related costs:

HELD, that the proceedings in question could not taken to keep alive the decree, or save limitation respect to the costs.

Phear, J.—IN December 1861, one Kh put Doss obtained a decree for possession certain property and also for costs. In 18 under an order for execution of this dec he obtained possession of this prope But he did not execute the decree so far as related to costs.

In consequence of his getting possess of the property, certain proceedings wh were initiated under the provisions of se tion 230 of the Civil Procedure Code to place between him and a third person. Th continued down to July 1868, when t claim of that third person was dismiss And it seems by the statement of the pl er for the respondent that the origi judgment-creditor has been in possess throughout of the property, which he tained in satisfaction of the decree. But the whole of this period he omitted to t out execution of that portion of the dec which related to costs. He applied for t purpose for the first time in December 187

The question now before us is wheth the lapse of time which has occurred bars hi Mr. Sandel has pressed upon us that t litigation with the third person, in

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nanner intervenor, who occupied the time om April 1865 to July 1868, ought to be ken under the provisions of section 20 of e Limitation Act, as proceedings which rve to keep alive the decree. But it is possible, it seems to us, that we should ve effect to this view, because this liti- tion concerned only that portion of the iginal decree which was already satisfied fore it commenced. Under these circum- nces, we think that the judgment-creditor mes too late in seeking to have execution the decree for costs, and is barred. The wer Appellate Court was of opinion that se proceedings did really keep the decree, en as regards costs, alive, and inasmuch the application for this execution was de within three years following upon the nd July 1868, that the application was in e. For the reasons we have given, we nk that this is erroneous, and the order of Lower Appellate Court must be reversed h costs.

The 11th March 1873.

Present:

e Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

ecution-sale — Postponements — Proclama- ions—Act VIII. of 1859, ss. 256, 257, and 259 —Objections—Jurisdiction.

In the Matter of

aboo Hurdeo Narain Sahoo, *Petitioner,*

versus

Girdharee Singh, *Opposite Party.*

r. R. E. Twidale and *Moonshee Maho- med Yusuf* for Petitioner.

boos Hem Chunder Banerjee and *Mohesh Chunder Chowdhry* for Opposite Party.

Where an execution-sale is postponed for short ods at the request of the judgment-debtor, on the inct understanding that the attachment and procla- ion are to subsist, and not to be renewed, no fresh clamation is necessary.

adequacy of price does not affect the regularity of proceedings.

f an application is made under Act VIII. of 1859, 6, on the ground of material irregularity, and such lication and the objections are disallowed, it is the y of the Court to pass an order confirming the sale ch has become absolute, and to grant a certificate to auction-purchaser under s. 259.

A Court has no jurisdiction to reverse a sale on ob- ions once overruled, and neither material nor caus- substantial injury.

Kemp, J.—On the 14th of December 872, the petitioner obtained a rule on the opposite party to show cause why the order of the Subordinate Judge of Bhaugulpore, dated the 9th of November 1872, reversing a sale in execution of a decree obtained by Collis against Girdharee Singh, should not be set aside, and the sale confirmed. The record was also sent for.

The petition states that, in execution of a decree obtained by Collis against the judgment-debtor Girdharee Singh, the property of the latter was sold on the 9th September 1872, and was purchased by the petitioner for Rs. 55,000. That on the 1st October 1872, the judgment-debtor presented a petition to the Subordinate Judge, praying that the sale be set aside on the grounds mentioned in the petition. This petition was rejected by the Subordinate Judge on the same date.

That, on the 4th November 1872, the petitioner prayed for a review of the order dated the 1st October 1872, alleging that he, the petitioner, had brought the money due under the decree with interest into Court.

Upon this petition an order was passed to the effect that, as the petitioner had raised various objections to the sale, he was to deposit the money if his statement, that he had brought it with him, was correct.

The judgment-debtor, thereupon, deposited the amount, and the Subordinate Judge, on the 9th November 1872, ordered that the sale be set aside and the decree-holder be satisfied out of the moneys deposited.

That, on the 11th November 1872, Hurdeo Narain, the petitioner before this Court, represented, in a petition to the Subordinate Judge, the grounds upon which his order of the 9th November 1872 was erroneous and without jurisdiction. This petition was rejected on the 11th of November 1872.

The grounds raised in the petition to this Court are :—

1st.—That, under section 257 of the Civil Procedure Code, the sale ought to have been confirmed when, on the 1st October 1872, the Subordinate Judge rejected the petition of the judgment-debtor to set aside the sale, that the right of the petitioner to have the sale confirmed became absolute, subject only to an appeal to the High Court. The Subordinate Judge, therefore, acted without jurisdiction in entertaining an application of review of the order disallowing the objections to the sale.

2nd.—That the order of the Subordinate Judge, dated 1st October 1872, rejecting the judgment-debtor's objections to the sale not being a decree, the provisions of section 376 of Act VIII. of 1859 do not apply, and the

Subordinate Judge had no jurisdiction to entertain the application for review.

3rd.—That if, for argument's sake, it be conceded that the Subordinate Judge had jurisdiction to entertain the application for review, still the order that was passed for setting aside the sale was without jurisdiction, inasmuch as no notice was issued to the petitioner, and the procedure prescribed by Chapter XI. of Act VIII. of 1859 has not been carried out.

4th.—That there is no evidence in the case that the property was sold at an undervaluation that, without evidence and material injury to the judgment-debtor, the Subordinate Judge had no jurisdiction to set aside the sale, merely in consequence of some alleged irregularity in publishing and conducting the sale.

It appears that, on the 2nd of September 1872, the judgment-debtor Girdharee Singh petitioned the Subordinate Judge asking for two weeks' time to enable him to raise the money due under the decree from a banker (name not given), the attachment and proclamation, the regularity of which was not in any way questioned, to remain in force. The Subordinate Judge passed an order on this petition to the effect that the sale be postponed to the 9th September 1872, and that, in case of non-payment, the property of the judgment-debtor would be sold on that date, *i. e.*, the 9th September 1872. A previous petition of the 5th August 1852 had been presented to the same effect, asking for time, and the Subordinate Judge gave the debtor time on the understanding that no second sale-proclamation was necessary. The judgment-debtor having failed to pay as promised on two different occasions, the sale took place on the 9th September 1872, and the petitioner became the purchaser for the sum of Rs. 55,000.

Upon this the judgment-debtor filed the petition contemplated by section 256. This petition is dated the 1st October 1872.

The main objections were that the writ of attachment and the proclamation of sale had not been served in due form; that there was a mistake in quoting the amount due under the decree in the writ of attachment, as well as the amount of sudder jumma in the proclamation; that no second proclamations of sale were published after time was given to the judgment-debtor on his presenting the petitions dated 1st August 1872 and 2nd September 1872.

That the price paid, namely, Rs. 55,000 was an inadequate price, the fair price of the property sold being Rs. 3,00,000.

The prayer of the petition is that the sale be set aside and the decretal money be received from the petitioner.

Upon this petition, the Subordinate Judge passed an order rejecting it; the order dated the 1st October 1872. Nothing th remained, the said objections being disallowed, but for the Subordinate Judge to pass order confirming the sale, leaving the judgment-debtor to appeal if so advised. Section 257, Act VIII. of 1859.

Instead of following this course, the Subordinate Judge received a petition from judgment-debtor applying for a review the order of the 1st October 1872.

This petition is dated the 4th of November, or more than a month after the rejection of the petition of objections to the sale. it the petitioner again stated that the property had been sold for an inadequate but he reduces the valuation of the prop from Rs. 3,00,000, as estimated in former petition, to about Rs. 2,00,00 He also alludes to the irregularities in publishing the sale which were recited in former petition, and he intimates that he brought with him the money due under decree with interest, accepting as correct sum stated to be due in the writ of attachment, which he alleged he had borrowed fr the firm of Roy Luchmeeput Bahadoor.

Upon this the Subordinate Judge, with satisfying himself that the judgment-deb had really brought the money with h passes the following extraordinary or dated 4th November 1872: "This peti "was filed to-day. As the judgment-deb "raises objections of different shapes" (wh objections, be it remembered, were identic the same as those already over ruled by Subordinate Judge), "it is ordered that "the statement that the petitioner "brought the money with him is correct, "do deposit it."

Subsequently, or on the 11th Novem 1872, the Subordinate Judge holds a p ceeding in which he states that the price which the property had been sold was doubt inadequate, and that it was w Rs. 2,00,000; he does not arrive at conclusion on evidence, but upon a ve statement of a gomashta of the auct purchaser, and he thinks an order to effect that the decree-holder was to take money deposited by the judgment-debtor,

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auction-purchaser receive back his pur-se-money could injure no party. He also ers to a case decided in this Court to the ect that, in cases of execution when the e is postponed from time to time, the sale-clamation must be renewed.

The auction-purchaser, being dissatisfied h this order, and being anxious to retain property which he had purchased, per-s under favorable terms, then petitioned Subordinate Judge, setting forth that, as objections of the judgment-debtor as to alleged irregularities in conducting the had been overruled, the auction-pur-er became entitled to receive a sale-ificate under the provisions of section of Act VIII. of 1859; that the sale has n set aside on the application for review the judgment-debtor without notice to , the auction-purchaser, and without ing his pleaders to be heard; that the r allowing the review is without juris-ion, the more so as no notice had been ed upon him. He therefore prayed that rs confirming the sale be passed, or at all ts that he should be heard.

The Subordinate Judge, upon receiving petition, records a proceeding, dated 9th ember 1872, briefly to this effect: at, as it appears that the sale has not en confirmed, and the debtor has deposited Court the interest of the purchase-money 12 per cent., and as the debtor has been atly damaged by the sale, and conse-ently he has paid the amount due under decree with interest, and as the property d is ancestral, and has been sold for a low nsideration, it is ordered that the sale be ersed."

his is the past history of the proceedings nected with this sale, and we are clearly pinion that, unless such proceedings as e are set aside, there can be no guarantee *nd-fide* purchasers at a sale in execution decree that a sale which has been pro-y conducted will not be set aside on the e of irregularities, unless the judgment-tor shall prove to the satisfaction of the t that he has sustained substantial injury reason of such irregularities which must material. Now, what are the alleged gularities, first, that the sale was twice ponned, but no fresh proclamations were ed. On this we may observe that the ponements were made, not for any inde-e period, when, perhaps, it would be neces-y to issue a fresh proclamation, but for t periods upon the request of the debtor, applied for time to enable him to raise the money due under the decree, and on the distinct understanding that the attachment and proclamation were to subsist, and not to be renewed.

The error as to the sudder jumma was, if an error at all (and of this there is no evidence), an error in favor of the judgment-debtor; for if the sudder jumma was quoted at a lower figure in the proclamation than the recorded sudder jumma, it was not a material error likely to depreciate the bids, but rather to stimulate the bidders at the sale, for intending purchasers could refer to the towjee; moreover, this objection was overruled by the Subordinate Judge.

As to the alleged inadequacy of price, this would not affect the regularity of the sale-proceedings. There is also no evidence whatever that the price paid is an inadequate one. It is clear that, under section 257, if an application is made, such as is contemplated in section 256, to set aside the sale on the ground of any material irregularity in publishing or conducting the sale, and such application and the objections be disallowed, the Court *shall* pass an order confirming the sale. It was, therefore, the duty of the Subordinate Judge when he rejected the application and overruled the objections of the debtor to pass an order confirming the sale which had become absolute, and to grant a certificate to the auction-purchaser under section 259.

The Subordinate Judge had no jurisdiction to reverse the sale on precisely the same objections which he had previously overruled, and which we have shown were not material, and did not substantially injure the judgment-debtor. Further, even if the Subordinate Judge was competent to review his order confirming the sale, and particularly without notice to the auction-purchaser, no new matter or evidence was discovered or adduced, which was not within the knowledge of the judgment-debtor when that order was passed; and the reason given by the Subordinate Judge, namely, the inadequacy of price, had already been urged and overruled, and was not, as shown above, "a good and sufficient reason." Section 376.

We reverse the order of the Subordinate Judge dated the 9th November 1872, and confirm the sale. The rule is made absolute with costs.

The 13th March 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice.*

Reference under s. 5, Court Fees' Act, 1870.

Case referred to the Honorable the Chief Justice by the Taxing Officer of the High Court under section 5 of the Court Fees' Act, 1870.

In the Goods of
Bindabun Ghose, deceased.

Case.—BINDABUN GHOSE and Bisto Doss Ghose were brothers, and were joint in estate. Bindabun Ghose has died unmarried, leaving no relative except Bisto Doss Ghose. Bisto Doss Ghose has obtained an order for letters of administration of the property and credits of the deceased, consisting of a half share

(1) of moneys in the Government Savings Bank deposited in the name of the deceased.

(2) of Government securities standing in the name of the deceased.

(3) of a family dwelling-house and small outstanding dues.

The other half share of the property above specified is claimed by Bisto Doss Ghose as belonging to him.

The letters of administration will enable the administrator to deal with the whole of the moneys and Government securities deposited or standing in the name of the deceased, and not only of his half share.

The question submitted for determination is, *1st*, whether or not Bisto Doss's half share is to be treated as trust property within the meaning of the Financial Resolution* 2904, dated 14th July 1871, and exempted from the payment of the two per centum *ad-valorem* fee prescribed by the Court Fees' Act, 1870, Schedule I., article 2.

Opinion of the Chief Justice.

Bisto Doss's half share should be treated as trust property, and be exempted from the payment of the 2 per cent. *ad-valorem* fee.

* In the exercise of the power vested in him by s. 35 of the Court Fees' Act, 1870, the Governor-General is pleased to remit in the whole of British India the fees chargeable under Schedule I., article 2 of the said Act, in respect of probate of wills or letters of administration in so far as such wills or letters of administration relate to property which a deceased person was possessed of or entitled to, not beneficially, but as a trustee for any other person or persons.

Provided that this remission shall not extend to cases in which a trustee has the power of appointing or otherwise conferring a beneficial interest in the said property.

The 13th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Execution-sale—Suit to reverse it.

Case No. 1169 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore dated the 10th May 1872, reversing a decision of the Moonsiff of Muxoodpore dated the 10th July 1871.

Koonjo Beharee Roy (Plaintiff), *Appellant*

versus

Kaminee Soonduree Debia and others (Defendants), *Respondents.*

Baboo Kumla Kant Sen for Appellant.

Baboos Bama Churn Banerjee and *Hem Chunder Banerjee* for Respondents.

Case.—One H, the owner of a jote, is said to have conveyed it to plaintiff by a deed duly registered; but plaintiff's name was not registered in the zemindar's serishta. The zemindar sued the recorded jotedar (H) for arrears of rent; but H having left the country, one D (said to be in actual possession) was substituted, and a decree passed. In execution the jote was sold, and was purchased by one of the defendants. Plaintiff sued to set aside the sale, and for declaration of right and recovery of possession, and obtained a decree in the Moonsiff's Court. The Subordinate Judge in appeal reversed the decree, holding that plaintiff had no *locus standi*, because he did not choose to deposit the rent claimed, or to give security, and so stop the sale:

HELD that there was no authority or countenance for this in the law.

Markby, J.—It is admitted by the vakeels who appear for the respondents, or, at any rate, by Baboo Hem Chunder Banerjee (as we have not been convinced by the arguments of Baboo Bama Churn Banerjee) that the decision of the Lower Appellate Court cannot be supported. The Lower Appellate Court has held that plaintiff has no *locus standi*, because he did not choose to deposit the rent claimed, or to give security, and so stop the sale.

There is no authority or any countenance for this in the law, nor any such proposition in Mr. Bell's work to which the lower Court has referred. Therefore, that judgment will be set aside, and the case remanded to the Subordinate Judge to consider the questions of law and fact which may be raised before him, which can only be decided upon a consideration of the evidence in the case, and which we are not at liberty to enter into.

The costs will abide the final result.

The 15th February 1873.

Present:

rd Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

ndu Law—Joint Family-property—Separate Acquisition—Onus Probandi.

*Appeal from the High Court of Judicature at Fort William in Bengal.**

Chand Hurree Maitee

versus

Rajah Norendro Narain Roy and another.

s a result of litigation, a decree was passed establish- the title of R as a brother by adoption to L, and a harer of his family property; but no possession was ally directed to be given to R, except of the zemin- y which was the principal family-estate. Subse- ntly an execution-creditor of R took possession of lots, which were no part of the zemindary proper; one having been acquired as a separate inheritance n ancestor, and the other having been purchased by the name of the priest of the family:

ELD, that R's title to the two lots was the same as le to the zemindary; and that the burden of proof pon those who insisted that the two lots did not part of the joint family-estate.

N this case their Lordships are of opinion the decree of the High Court cannot sustained, and that the decree of the ciating Principal Sudder Ameen ought e affirmed.

he property in question consisted of two ll lots of land, apparently of considerable e at the present time, which had been n possession of by the appellant as an cution-creditor of one Roodro Narain, ch Roodro Narain was by adoption the her of Lukee Narain, the predecessor in of the respondents. It appears that dro Narain and Lukee Narain, as far back he year 1845, had litigation for the pur- e of establishing the title of Roodro ain as a brother and co-sharer in the ily property. He succeeded in that liti- on. His title was established as a her and co-sharer. But it appears, as s there is any evidence before their dships, that, in the decree establishing his t, no possession was actually directed to iven to him, except of the zemindary, ch was the principal family-estate. It ars that the two lots in question were no of the zemindary proper, but one of them had been acquired as a separate inheritance by the ancestor, and the other was purchased by Lukee Narain himself before the title of Roodro Narain was established. It was purchased benamee in the name of the priest of the family. The Sudder Ameen decided in favor of the appellant. Their Lordships are of opinion that, under the circumstances, Roodro Narain's title to the two lots was precisely the same as his title to the zemindary; that the family property with regard to the one lot would be exactly in point of title the same as the zemindary itself; and with regard to that, which was purchased in the name of the priest, the presumption of law and the presumption of fact would be that the property acquired in that way by the managing representative member of the joint family would be joint family property. The burden of proof, therefore, lay upon those who insisted that these two lots did not form part of that joint family-estate. If they did form part of that joint family-estate, then the title of the execution-creditor, so far as it was affirmed by the Principal Sudder Ameen (which was only to one moiety), was a good title. It was, therefore, on the respondents to show that there had been anything which amounted to adverse possession so as to be an ouster of the co-tenant.

Their Lordships, having looked through the evidence, are satisfied that there is nothing like trustworthy evidence that amounts at all to proof of such adverse possession or ouster. It is perfectly well known to all persons conversant with these matters in India that the receipt by one member of a family may be quite consistent with the title of the whole. One member of a family may be in receipt of one part of an estate, and another may be in receipt of another part of the estate, and they may have afterwards to account the one to the other in respect of the excess of receipts over their respective rights. Moreover, there being no evidence of the adverse possession, except the receipt of rents on behalf of Lukee Narain and Lukee Narain's descendants, there is, on the other side, evidence of very nearly the same character, evidence not amounting to much, but evidence of the same character and description showing Roodro Narain's occupation or possession of part of the property, his personal dealing with it, and also receipts of rent on his behalf.

Under those circumstances their Lordships will humbly recommend to Her Majesty that the decree of the High Court be reversed,

* rom the judgment of Bayley and Macpherson, n Regular Appeal No. 166 of 1867, decided February 1868.

and the decree of the Principal Sudder Ameen be affirmed; that the appellants receive back all the costs which they have paid under the order of the High Court; and that having regard to the arrangement entered into by the appellant with the respondent Norendro Narain Roy, that each party was to bear his own costs in the lower Courts and all subsequent Courts, their Lordships will recommend that one-half the costs of the appellant in the Courts below, and one-half the costs of this appeal be paid to him by Ranee Treepoora Soondoree, the second respondent.

The 24th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp and C. Pontifex, *Judges*.

Declaratory Decree—Proclamation—Survey Map.

Case No. 304 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Mymensingh, dated the 2nd September 1872.

Rajah Raj Krishna Singh Bahadoor (Decree-holder), *Appellant*,

versus

The Collectors of Mymensingh and Gowalparah on behalf of Government (Judgment-debtors), *Respondents*.

Baboo Nullit Chunder Sen for Appellant.

Baboo Unnoda Pershad Banerjee for Respondents.

The holder of a decree which declares that the boundary line laid down in the survey-map as the boundary line of the plaintiff's permanently-settled estate is not the true boundary line, is not entitled either to have the decree proclaimed on the spot, or to have the line erased from the survey-map.

Couch, C.J.—THE prayer of the appellant in the Court of Mymensingh was that the terms of the decree might be proclaimed on the spot, and that the line delineated on the survey-map might be erased from it. Now the terms of the decree are: "It is "hereby declared that the boundary line laid "down in the survey-map as the boundary "line of the said plaintiff's permanently-settled "estate is not the true boundary line, and "that the said plaintiff is not bound by the "said survey-map, or by the order of the "Collector of the 15th April 1859 and the "subsequent proceedings thereon." That the decree was advisedly put in that form is evident from the language of Sir Barnes Peacock, who says at the end of his judgment: "It appears to me that the appeal must be "allowed, and the decisions of the lower Court "and of the Division Bench of this Court "be reversed so far as they declare that the "plaintiff is entitled to the lands specified "in the plaint, and that we must merely "declare that the boundary line laid down "in the survey-map as the boundary line of "his permanently-settled estate is not the "true boundary line," this being followed in the decree. Therefore, it does not authorize the interfering with the survey-map, or the erasing any line drawn upon it; and this would seem to have been done, because the line on the map is not merely a line showing the boundary of the plaintiff's estate, but a line drawn on the map for other purposes also.

That being so, there was a very good reason for the Court in making this decree confining itself to simply declaring that the boundary line was not the true boundary line of the estate, and that the plaintiff was not bound by the map, or by the orders of the Collector passed thereon. The making a declaration that the plaintiff is not bound by the map instead of showing that the decree was to be carried out by erasing the line from it rather indicates that the Court intended that the line was to remain on the map. Therefore the appellant is asking for that which the decree does not authorize, and which certainly would not be authorized by what is laid down by the Judicial Committee in the case quoted, Barlow *vs.* Ord;* the decree there was of a very different nature from the present; for, although it declared a right to a share, and stopped short of giving directions as to the recovery of it, there could be no question that this was the only way in which effect could be given to the declaration. That does not apply to a case like the present, or to the manner of executing this decree, which the present appellant asks for.

Then the other part of his prayer is that the decree may be proclaimed on the spot; the words of the application are that the decree might be proclaimed through the Court; it does not say where, and I presume therefore, that it means that it should be proclaimed on the spot where the disputed boundary is; but there is no provision in the

* 18 W. R., 175.

entitling a party to have a decree declaring his right to land proclaimed on the spot, no law says that that is to be done, and it is not a mode of executing a mere declaratory decree. He is, therefore, not entitled to that. I think that the decision of the lower Court rejecting the application was right upon the ground that it asked for that which the appellant was clearly not entitled to. Even supposing the appellant to be right in his contention that this declaratory decree ought to be executed in some form or other, I do not think it is advisable, whilst an appeal is pending before the Privy Council, that a step of this kind should be taken, and that should be done which would simply amount to a publication of the decree. Without determining whether the appellant would be entitled to it, I do not think it would be advisable now to do it.

We must dismiss the appeal with costs.

Kemp, J.—I concur.

Pontifex, J.—I concur.

The 27th February 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Guardians and Minors—Right of Action.

Case No. 349 of 1872.

Special Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 3rd October 1871, reversing a decision of the Additional Moonsiff of Baraset, dated the 30th November 1870.

Monmohinee Joginee (Plaintiff), *Appellant,*

versus

Jugobundhoo Sadhookha (Defendant), *Respondent.*

Baboo Opendro Chunder Bose for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Plaintiff gave a mokurruree lease of her infant son's share of a piece of ground to her deceased husband's brother (a co-sharer), who then leased the land to defendant; plaintiff affixing her signature to the latter lease. Less than two years after this, plaintiff brings the present suit claiming possession on the ground that the lease to defendant is prejudicial to her infant son, who ought not to be prejudiced by her act:

HELD, that the proper course to adopt in such a case would be to refuse to the mother the authority of the Court to carry on the suit on behalf of the infant, treating it as a suit on her own account, to dismiss it with costs payable from her own pocket, leaving the minor to sue to set aside the lease through some other person as his next friend.

Jackson, J.—THE subject-matter of the case here is a piece of ground belonging in equal shares to the plaintiff Monmohinee's infant son and to the brother of her deceased husband. The plaintiff, it is said, gave a *mokurruree* lease of the infant's share to the brother, and the brother then leased the land to the defendant, who has thereon built a pucka house. The plaintiff affixed her signature to the lease granted by the brother to the defendant, and in less than two years from the making of the lease the plaintiff sues the defendant, claiming possession of the land on the ground that the lease s prejudicial to her infant son, and that he ought not to be prejudiced by her act.

The Moonsiff, having the interests of the minor chiefly in view, gave judgment for the plaintiff, but the Lower Appellate Court, looking rather at the conduct of the mother, who is plaintiff on the record suing on behalf of her son, declared that she ought not to be allowed to set aside her own act, and reversed the decision of the first Court.

We think, on the one hand, the minor ought not to be concluded by an act done to his prejudice by the mother acting as his guardian, and that, on the other hand, she ought not to be allowed, immediately after consenting to the lease granted to defendant, to turn round and avoid her own act by setting up the interests of her own son. If some third person had come forward as the next friend of the minor, and brought this suit in good faith, making the mother a defendant in the cause, the state of things would have been otherwise. As it is, it seems to us that the proper course would be to refuse to the mother the authority of the Court to carry on the suit on behalf of the infant, and, treating it as a suit on her own account, to dismiss it with costs payable by her from her own pocket, leaving the minor to sue to set aside the lease through some other person as his next friend. The judgments of both the lower Courts are set aside.

The 1st March 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges.*

Rent-suit on a false Ground—Civil Rights.

Case No. 868 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 16th April 1872, reversing a decision of the Moonsiff of Bishenpore, dated the 31st January 1872.

Kishen Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Rajoo Dey and others (Defendants), *Respondents.*

Baboo Nil Madhub Sen for Appellant.

Baboo Kalee Kishen Sen for Respondents.

In a suit for arrears of rent where defendant's plea of payment falls to the ground, the fact of plaintiff having sued upon a false ground is no reason why he should not obtain a decree at the rate fixed by a former decree as the proper rate demandable from the defendant.

Mitter, J.—In this case we are not in a position to interfere with the finding of the Lower Appellate Court that the rent of the defendant's tenure was payable in cash, and not in kind as alleged by the plaintiff. But accepting that finding as far as it goes, we see no reason whatever why the plaintiff should not obtain a decree at the rate fixed by the former decree as the proper rate of rent demandable from the defendant. The learned Judge says in his judgment that the plaintiff is not entitled to obtain a decree at that rate, because he, the plaintiff, has brought this suit upon a false ground. But whatever responsibility the plaintiff might have incurred by instituting an action upon a false ground, we do not see any reason why he should lose his civil rights, particularly when it is clear that any future suit brought by him for the arrears of the period involved in this suit would be certainly liable to be dismissed under the provisions of section 2, Act VIII. of 1859.

The defendant in his written statement pleaded that he had paid a portion of the rent due from him to the plaintiff's landlord. The Moonsiff who tried the case in the first instance came to the conclusion that this allegation was not proved; and he further held that the alleged payment by the defendant to the plaintiff's landlord, without the plaintiff's permission or authority, was not binding against the plaintiff. The defendant did not appeal to the Judge against either of these findings, and it is, therefore, clear that the plaintiff is entitled to obtain a decree for arrears of rent at the full rate of Rs. 29-11-5 per annum, the defendant's plea of payment having fallen to the ground. A decree will, therefore, be entered for the plaintiff for the sum of Rs. 89-10-3, that being the amount due for the three years for which this suit was brought.

We think that, under the circumstances of this case, each party ought to bear his own costs both in this Court and in the Courts below.

The 4th March 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act X. of 1859, s. 56—Mode of Service of Summons—Ex-parte Decrees—Execution-sales—Jurisdiction.

Case No. 246 of 1871.

Regular Appeal from a decision passed by the Second Subordinate Judge of the Twenty-four Pergunnahs, dated the 31st July 1871.

A. B. Mackintosh (Plaintiff), *Appellant,*

versus

Kalee Doss Mullick and others (Defendants), *Respondents.*

The *Advocate-General* and *Baboo Ambika Churn Ghose* for Appellant.

Baboos Gopal Lall Mitter and *Nil Madhub Bose* for Respondents.

The words in Act X. of 1859, s. 56, as to a summons or Proclamation having been "duly served according to the Provisions of this Act," refer to the mode of service, and not to the agency by which it is effected, and the fact that the summons was not served through the Collector of the District, but by an officer of the Court itself, would be no ground for not proceeding with the case if the summons had been served in the manner the Act (s. 56) requires.

An irregularity of this kind by which the party is not injured does not vitiate the proceedings or render the *ex-parte* decree void; and even if the decree in such case is set aside, the sale held in execution of it does not thereby fall to the ground.

Quære.—Is the Civil Court (including also the Court of the Moonsiff) competent to inquire into the regularity of decrees obtained in the Revenue Court, and either set them aside, or treat them as nullities, on the ground of greater or less irregularities in the proceedings?

Couch, C.J.—The case put forward in the plaint in this suit was that Nobin Chunder Bose had made a purchase as the benamedar for the 2nd, 3rd, and 4th defendants; that the 6th defendant had subsequently made a collusive purchase from Nobin Chunder Bose; that the sale at which the property

uit was purchased was in execution of a ecree passed in a previous suit; that as the uit was irregular and collusive, the decree ssed therein, and the sale in pursuance of were invalid, and the plaintiff prayed that e illegal and collusive sale, as he called it, ould be set aside.

There was no pretence for alleging that ere was any collusion on the part of the ollector, nor has it been shown that Charoo hunder or Shurruth Chunder brought out the sale by any intentional default in ying the rent due to the Government. In ct, the case as presented to us now is that obin Chunder Bose purchased on behalf of aroo Chunder and Shurruth Chunder, and was simply a case of a benamee transacon.

An objection has been taken to the validity the sale that the defendants in the suit ought by the Government were not sumoned. It was put as high as that by the rned Advocate-General. This objection, hough not distinctly raised in the plaint, ay be considered as coming under the egation that the suit was irregular.

It appears that the suit being commenced the Government through Bussunt Coomar ookerjee, the head mohurir, Ashootosh b and Promuthonath Deb were made fendants in the plaint. Then it was disvered that they were dead, and the 2nd, d, and 4th defendants accepted the sumons, and granted receipts as the heirs. A mmons was issued entitled, "In the suit of osunno Coomar Mookerjee, head mohurir, part of Government" as plaintiff, and ese three persons as defendants, requiring em to appear on the 9th of April 1868. is summons appears from the receipt of peon which is annexed to it to have been ved by being affixed to the outer door of house of the defendants, it being stated t, on search, they were not to be found. w, section 45 of Act X. of 1859 provides t "the summons shall be served by delitering a copy of the summons to the defendnt personally when practicable, or, if the ummons cannot be served on the defendnt personally, by affixing a copy of it to ome conspicuous part of his usual place of abode, and also affixing a copy of the ame in the Collector's office."

Section 47 provides that, "if the place of bode of the defendant be in another district, e summons, together with the cost of the rvice thereof, shall be sent, by the public ost, to the Collector of such district, who hall issue the summons, and return the "same after service, with the prescribed en-"dorsement, to the officer by whom it was "transmitted to him."

These defendants, it is said, were living in another district, in the district of Calcutta, the proceedings being in the Court of the Collector of the Twenty-four Pergunnahs, and it is upon the ground that the summons was not sent in the manner indicated to the Collector of Calcutta that the Advocate-General has rested his objection to the validity of the decree.

It is true as argued by him that section 56 says: "If on the day fixed by the sum-"mons or proclamation for the appearance of "the defendant, the plaintiff only appears, the "Collector, upon proof that the summons or "proclamation has been duly served, accord-"ing to the provisions of this Act, shall pro-"ceed to examine the plaintiff or his agent, "and after considering the allegations of the "plaintiff and any documentary or oral evi-"dence adduced by him may pass judgment "*ex parte* against the defendant." But it appears to me that the words as to the summons or proclamation being duly served according to the provisions of the Act refer to the mode of service directed by section 45, and that it would not be a ground for not proceeding with the case that the summons was not served through the Collector of the district, but by an officer of the Court itself, if the summons had been served in the manner the Act requires, namely, personally when it is practicable, or by affixing a copy to the defendant's place of abode when personal service is not possible.

Section 58 provides that an appeal shall not lie from a judgment passed *ex parte* against a defendant who has not appeared, but that in all such cases if the defendant shall within 15 days after any process for enforcing the judgment has been executed, or at any earlier period show good and sufficient cause for his previous non-appearance, and satisfy the Court that there has been failure of justice, the Collector may, upon such terms and conditions as to costs or otherwise as he may think proper, revive the suit, and alter or rescind the decree as the justice of the case requires. In this case I think there was an *ex-parte* judgment against the defendants, which, if they had been prejudiced by the summons having been served on them in this manner instead of through the Collector of Calcutta, they should have applied to have set aside. There would be really no reason for setting aside the judgment if they had notice of the proceedings.

The summons having been served on them by a person from the Court of the Twenty-four Pergunnahs would give them notice just as well as if it had been served by a peon of the Collector of Calcutta. It seems to me there is no reason for holding that an irregularity of this kind by which the party is not injured vitiates the whole proceedings and renders the decree void, and as was contended for by the learned Advocate-General that the sale should also be treated as void, and as giving no title to the purchaser. No authority going to such a length had been quoted to us. I think the decree was not rendered void by the summons not being served through the Collector of Calcutta.

We have then to consider whether the plaintiff has made out his case that Nobin Chunder Bose purchased as a benameedar for the 2nd, 3rd, and 4th defendants. As to this we have first the statement of Charoo Chunder Ghose. It does not appear to me that any reason is shown for our thinking that he was not telling the truth. I must say that the Court is not to give effect to an imputation of fraud or falsehood without some evidence to support it. He says he did not mention anything to Nobin Chunder Bose about the auction-sale, nor that Nobin Chunder Bose mentioned anything about the purchase to him; that since that time they had no interview; and that he did not get the rents of the portion of the land which was purchased by Nobin Chunder Bose after his purchase. On cross-examination the question is put to him, and he gives a direct denial. He says: "The purchased portion of Nobin Bose had "not been purchased by us directly, nor in "his benamee, from the estate of Ashootosh "Baboo. I heard before this case about "Kalee Doss Mullick's purchase of the above "portion from Nobin Bose. We have not "purchased in the benamee of Kalee Doss "Mullick from Nobin Bose his purchased "portion in Ashootosh Deb's estate." This evidence most distinctly contradicts the case of the plaintiff. Nobin Chunder Bose also says that he made the purchase on his own account. Possibly some portion of his evidence, as where he says how he came to purchase the land, is open to observation, but there is his statement that he made the purchase for himself, and afterwards received the rent of the purchased property. It is shown that he received money in order to complete this purchase, and another which he made about the same time from Neel Kant Haldar. There is no doubt that money which he paid came from that quarter. The notes have been traced, and so far there is every information given as to the very material question, viz., where the money came from. The plaintiff had an opportunity of investigating the matter and showing if he could that, although the money was apparently supplied by Neel Kant Haldar, it was, in fact, supplied by Charoo Chunder and the other defendants. No attempt of the kind has been made by the plaintiff. Some suspicion, no doubt, is thrown upon the case by two dakhilas which purport to have been given by the executors of Ashootosh Deb, a fact not consistent with the evidence that the rent was paid to Kalee Kisto on behalf of Nobin Chunder Bose; but the probable explanation of this is that Kalee Kisto was at that time employed to collect the rents for Charoo Chunder and Shurruth Chunder as well as Nobin Chunder Bose. Whether it was by design or by mistake that these two dakhilas were so given it is impossible to say, but their mere existence is not, I think, sufficient to lead us to the conclusion that the statement of Nobin Chunder Bose is false, and that he was not in receipt of the rent. Kalee Kisto has also been examined, and everybody has been called who could throw any light on the transaction. Kalee Doss Mullick states that after the purchase, he took possession of the property and received rents from the tenants and that Charoo Chunder had no right in the property. In this state of the case, the utmost that it seems to me the learned Advocate-General is entitled to say is that there is considerable suspicion that it was a benamee purchase. I think this alone is not sufficient to entitle plaintiff to such a declaration as he asks for. We must be satisfied by evidence that his case is a true one, and that the purchase by Nobin Chunder Bose was really a benamee purchase for Charoo Chunder and the other defendants. The evidence is not to my mind sufficient to lead us to that conclusion. It would not be so if we were trying the case in the first instance, but I must not forget that the case has been tried and it seems to me carefully, by the Judge of the lower Court, and we are asked to say that the decision he has come to is a wrong one.

The appeal must be dismissed with costs.

Jackson, J.—I am entirely of the same opinion. On the first part of the case the plaintiff asks us, sitting here in appeal, to declare that the decree obtained against Charoo Chunder and his co-defendants was a nullity, and then to go on and set aside

d

le by which the land in dispute was conyed to Nobin Chunder Bose. I entirely ncur in the view taken by the Chief Justice to the meaning of the words in section 56, t X. of 1859, with reference to a summons ing duly served according to the provisions that Act. It seems to me that those rds clearly refer to the mode in which a mmons is to be served, and not to the ency by which it is to be served. If we ppose that the plaintiff, or that the defendts in the rent-suit, had proceeded by way application to the Revenue Court to set de the *ex-parte* decree on the ground that summons was not duly served under the visions of the Act, can we suppose that Revenue Court would, adverting to the ms of section 58, have set aside its own cree? It must be borne in mind that the d in respect of which the arrear of rent s claimed is in Dehee Punchannogram, ich is a suburb of Calcutta, and that the upants of the land lived just within the n of Calcutta at a distance which does precisely appear, but which certainly does exceed two or three miles. Can we supse that, under such circumstances, the Coltor would have held that the summons had been duly served according to the proions of the Act, because the serving officer s a peon on his own establishment, and not the establishment of a neighbouring Coltor, and that in consequence failure of ice occurred, for, unless he were of that nion, he could not have granted a new l? Then is the plaintiff in the present e to be in a better position than the defendts in the rent-suit would have been, if y applied under section 58, Act X. of 59? It appears to me that he ought not, d that there would be considerable danger allowing him so to stand; for otherwise, tead of submitting the question as to the ularity of the rent-decree obtained to the urt which granted it, it would be leaving matter to be tried by a different Court, d considerable facility would thus be afford for collusion between the plaintiff and the endant for the purpose of defeating a rd party, the purchaser of the land sold. t, in addition to that, it seems to me to be tremely doubtful whether the Civil Court, ich includes not only the Court of the trict Judge and of the Subordinate Judge, also that of the Moonsiff, is competent to uire into the regularity of decrees obtain in the Revenue Court, and either set them de, or treat them as nullities, on the ground greater or less irregularities in the proceedings. But, even if we admit that the decree ought, in this case, to have been set aside, and that the Civil Court might deal with it as the plaintiff asked, will the sale for that reason be annulled? As far as I am aware, all the decided cases in this Court take the clear position that, under such circumstances, the sale, which has been held in execution of a decree, either of the Civil or the Revenue Court, does not fall, simply because the decree has been afterwards set aside. I think, therefore, that this Court could not, on the ground contended for by plaintiff, even if it were made out, declare the sale to be invalid.

On the question of fact, I would only observe that the circumstances of suspicion which have been dwelt upon by the learned Advocate-General, and to which the Chief Justice has adverted in his judgment, are, putting them at the highest, only circumstances going to show that the successive purchasers of the property in suit may have purchased it for some persons other than themselves. Howsoever far in that direction they might go, they could only benefit plaintiff, as the Advocate-General clearly saw, if there had been clear evidence indicating possession on the part of Charoo Chunder. It seems to me that the evidence adduced by plaintiff on that point falls very far short of what is necessary. On this question of fact we must also bear in mind that we have the evidence of Charoo Chunder, Nobin Chunder Bose who has now no interest in the matter (because if he made the purchase benamee for Charoo Chunder and others, he had himself no interest, and if he purchased on his own account, his interest has passed to Kalee Doss Mullick), Kalee Doss Mullick, and Chunder Nath Nag, a person of considerable respectability, who has no immediate interest in the property, although his wife Nishadinee seems to have some interest.

I entirely agree with the Chief Justice in thinking that, if we were trying the case as Judges of first instance, we could not, upon the evidence as it stands, give a judgment in favor of plaintiff. Here we have, in addition to the weakness of the plaintiff's case, the opinion of a Subordinate Judge thoroughly versed in such matters and well qualified to give an opinion on the subject.

I agree, therefore, in thinking that this appeal must be dismissed with costs.

Mitter, J.—I am of the same opinion. I do not think that the mere fact of

non-service of summons according to the provisions of the Act is sufficient to render a decree passed by a Court of competent jurisdiction an absolute nullity; for, it is clear from the provisions of section 119 of Act VIII. of 1859, as well as from those of section 58, Act X. of the same year, that, unless such a decree is impeached within the time prescribed by those sections, its validity cannot be questioned afterwards. If a decree passed by a Court of competent jurisdiction were, as contended by the appellant, an absolute nullity, merely because the summons had not been duly served, the Legislature would not have made those provisions for having such a decree set aside within a prescribed period of time. I have further to remark that the objection as to the validity of the decree does not affect the sale to the purchaser Nobin Chunder Bose, and in that respect the case falls within the principle laid down in the case of Jan Ali, reported at page 56 of Volume I.,* Bengal Law Reports. In that case, a suit for arrears of rent had been brought against the plaintiff, and an *ex-parte* decree passed against him. While that decree was in force the plaintiff's property was sold in execution, and purchased *bonâ fide* by one of the defendants. The decree was afterwards set aside on the application of the plaintiff under the provisions of section 58, Act X. of 1859, upon the ground that he had been kept in ignorance of the proceedings instituted against him by the fraud of the principal defendant. But, notwithstanding the reversal of the decree, the Court refused to interfere with the sale on the ground that, at the time when it was made, the decree was in full force.

As to the question of benamee I have nothing to add. It seems to be quite clear that the plaintiff has given no tangible evidence on the strength of which it can be held that the purchase made by the defendant Nobin Chunder was a benamee purchase for the defendants 2, 3, and 4.

The 7th March 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges.*

Ancestor's Fraud—Pleadings.

Case No. 927 of 1872.

* 10 Weekly Reporter, Civil Rulings, 154.

Special Appeal from a decision passed by the Judge of Dacca, dated the 27th March 1872, affirming a decision of the Subordinate Judge of that District, dated the 23rd August 1871.

Golam Koodsee Chowdhry (Plaintiff), *Appellant,*

versus

Johoorunnissa Khatoon and others (Defendants), *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Where the agreement which formed the basis of a suit was found to have been entered into by the plaintiff and the defendant's ancestors in furtherance of a fraud, it was held that defendant was at liberty to show what the real circumstances were under which the agreement was entered into, even though it disclosed the fraud of his own ancestor.

Mitter, J.—It appears to us that this special appeal must fail.

Both the lower Courts have concurrently found as a fact that the agreement which formed the basis of this suit was entered into by the plaintiff and the defendant's ancestors in furtherance of a gross fraud jointly committed by them and another person named Zumurooddunnissa against the creditors of Zumurooddunnissa.

It has been argued before us that it was not open to the defendant to go behind the agreement, and to rely upon a state of facts which discloses the fraud of his own ancestor.

We are clearly of opinion that this objection is untenable. It cannot be contended for one moment that, because the plaintiff did not like to disclose the real circumstances under which the agreement in question was entered into between the parties, the defendant should be prevented from showing what those circumstances were; and it would be contrary to all rules of equity and good conscience to hold that the plaintiff ought to be permitted to commit a second fraud on the basis of the one already committed by him and the defendant's ancestor. I have had frequent occasions to consider this point, and I think that there can be but one answer to suits of this kind, namely, that of dismissal.

The appeal is dismissed with costs.

Birch, J.—I concur.

The 7th March 1873.

Present :

he Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges.*

Indivisible Tenure—Rent-suits.

Cases Nos. 871, 892 to 899 of 1872.

pecial Appeals from a decision passed by the Judge of Midnapore, dated the 22nd February 1872, affirming a decision of the Moonsiff of that District, dated the 16th September 1871.

Messrs. R. Watson and Co. (Plaintiffs), *Appellants,*

versus

risto Mohun Rukhit and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellants.

aboos Kumla Kant Sen, Sreenath Banerjee, and *Jogendro Nath Bose* for Respondents.

An indivisible tenure cannot be split up into parts with view to the institution of different suits against the tants for arrears of rent.

Mitter, J.—In these cases we do not think necessary to express any opinion on the liminary objection which was raised by pleader for the respondent under the visions of section 102, Act VIII. of 1869 C.). It is sufficient for us to say that both lower Courts have concurrently found t the tenure in question was one indivisible ure, and the plaintiff, special appellant, had right to split it up into different parts, and institute different suits against the tenant arrears of rent. It has been contended t the lower Courts have misunderstood the lement-proceedings; but this contention not been made out to our satisfaction.

We dismiss these appeals, and we allow sts in those cases in which the respondents e appeared.

The 11th March 1873.

Present :

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Family of Maharajah of Chota Nagpore—Succession—Custom—Hindu Law—Onus Probandi—Presumption.

Case No. 229 of 1871.

Regular Appeal from a decision passed by the Deputy Commissioner of Lohardugga, dated the 26th September 1871.

Thakoor Jeetnath Sahee Deo (Defendant), *Appellant,*

versus

Lokenath Sahee Deo (Plaintiff), *Respondent.*

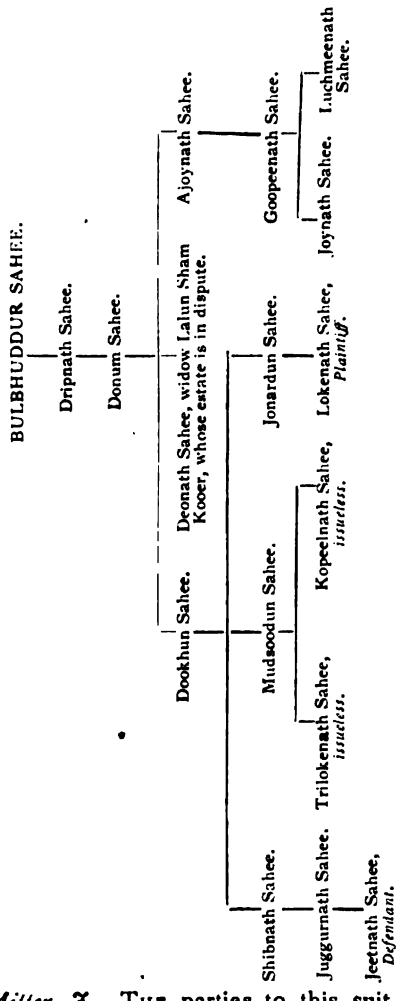
Messrs. J. T. Woodroffe and *R. E. Twidale* and *Baboo Mohesh Chunder Chowdhry* for Appellant.

Mr. C. Gregory for Respondent.

An action was brought by the members of a junior branch of the family of the Maharajah of Chota Nagpore to recover possession of a fourth share of certain moveable and immoveable properties which originally formed part of an estate granted to one Thakoor A. S., a junior member of the family, for his maintenance by a former Maharajah. On A. S.'s death, the eldest of his surviving sons succeeded to the thakooree guddee, and one of his younger sons, Thakoor B. S., the admitted common ancestor of the parties, obtained a portion of that estate for his maintenance, including the properties in dispute, and the last person seised of them until her death was L. S., as the representative of her deceased husband D. N. Plaintiff's case was that D. N. having died without issue, all the properties ought, "according to the Hindu Shastras and the custom of the family," to be divided equally between all the surviving male descendants of the common ancestor, "defendant's answer being that, according to the long-established custom of the family of B. S., he (defendant), as the representative of the eldest branch thereof, was entitled solely and exclusively to the properties in dispute :"

Held, that the burden of proving the affirmative lay upon the plaintiff, whose claim was not based upon the ordinary Hindu law of inheritance ; but upon a special custom without reference to claimants' positions in the family, or their capability to satisfy the conditions of heirship :

Held, that, as, according to the custom in the eldest branch of Thakoor A. S 's family, the property left by a childless member devolved on the eldest or the guddee thakoor, and as defendant's position in B. S.'s branch of the family was similar, *i. e.*, that of a thakoor, he had every right to contend that the same custom must be presumed to obtain in both until the contrary was proved.



Milter, J.—The parties to this suit are members of a junior branch of the family of the Maharajah of Chota Nagpore, and the relation in which they stand to each other may be seen from the short genealogical tree given at the head of this judgment.

The plaintiff brought this action, as the representative of his father Jonardun Sahee, to recover possession of a fourth share of the moveable and immoveable properties mentioned in the schedule attached to his plaint. These properties, it is admitted on both sides, originally formed part of an estate which was granted to one Thakoor Aynee Sahee for his maintenance by one of the former Maharajahs of Chota Nagpore; the said Thakoor Aynee Sahee being one of the junior members of the family of the grantor. On the death of Thakoor Aynee Sahee, the eldest of his surviving sons succeeded to the thakooree guddee, as well as to the bulk of the estate above referred to, and one of his younger sons, Thakoor Bulbhuddur Sahee, the admitted common ancestor of the parties, obtained a portion of that estate for his maintenance. The properties now in dispute formed part of the share thus obtained by Thakoor Bulbhuddur Sahee, and the person last seised of them was Lalun Sham Kooer, who held the same as the representative of her husband Deonath Sahee, deceased, down to the date of her death, which took place on the 12th of Jeyt 1927 S. E.

The case of the plaintiff as set forth in his plaint was that Deonath Sahee having died without issue, all the properties in question ought, "according to the Hindu Shastras and the custom of the family," to be divided equally between all the surviving male descendants of the common ancestor Thakoor Bulbhuddur Sahee, and as there are four such descendants, namely, the plaintiff's father Jonardun Sahee, the defendant Jeetnath Sahee, and the two plaintiffs in Regular Appeal No. 230 of 1871, whose names are Joynath Sahee and Luchmeenath Sahee, the plaintiff, as the representative of his father Jonardun Sahee, laid claim to a fourth share of those properties.

The answer of the defendant Jeetnath Sahee was to the effect that, according to the long-established custom of the family of Thakoor Bulbhuddur Sahee, he, the said defendant, as the representative of the elder branch thereof, is entitled, solely and exclusively, to the properties in dispute, and that Lalun Sham Kooer had, a short time before her death, made a verbal gift of all the moveable properties in her possession in his favor.

In this state of the pleadings, the Deputy Commissioner of Lohardugga, who tried the case in the first instance, laid down the following issues, namely:—

1st.—"Whether, according to the family "custom, the plaintiff is entitled to a fourth "share of the property in dispute, or the "defendant to the whole in consequence of "his being descended from an elder branch "of the family?"

2ndly.—"Whether the deceased Lalun "Sham Kooer made a gift of her personal "property to the defendant, and, if so, whether "such gift is valid?" and

3rdly.—"What is the annual income of "the estate and the value of the personal "properties, &c., taken possession of by the "defendant."

The learned Deputy Commissioner found the first and second issues in favor of the plaintiff, and accordingly gave him a decree, leaving the third issue to be determined

execution. Hence the present appeal by the defendant.

We are of opinion that the decision of the learned Deputy Commissioner is erroneous, and ought, therefore, to be set aside.

We think there can be no doubt whatever that the burden of proving the affirmative of the first part of the first issue lies upon the plaintiff, and we are by no means prepared to say that he has succeeded in discharging that burden. The learned Deputy Commissioner seems to have thought that the previous decisions of the Civil Court, bearing date the 5th of March 1815 and the 3rd of May 1834, respectively, are sufficient to make out a strong *primâ-facie* case in the plaintiff's favor, and he has accordingly thrown the whole burden of proof on the defendant. But, in this opinion, we are wholly unable to concur. The only point which was determined by the decisions above referred to was that, on the death of any member of Thakoor Bulbhuddur Sahee's family, all the sons of the deceased are entitled to obtain equal shares of the estate left by him. But there is a wide gulf between that point and the point upon which the plaintiff has thought fit to rest his claim in the present case. That claim, it should be borne in mind, is not based upon the ordinary Hindoo law of inheritance. The plaintiff does not say that Jonardun Sahee, Jeetnath Sahee, Joynath Sahee, and Luchmeenath Sahee are entitled to participate equally in the estate of Deonath Sahee, because they are his heirs under that law. Indeed, such a statement would have been manifestly untenable, it being beyond all question that the said individuals cannot, under any circumstances, be considered as related to Deonath Sahee as sapindas of equal degree, and therefore entitled to share as co-heirs. But the plaintiff relies upon a special custom by virtue of which he says, all the surviving male descendants of the common ancestor Thakoor Bulbhuddur Sahee are entitled to obtain equal shares of the properties left by a childless member of the said Thakoor's family, without any reference whatever to their position in the family-line, or to their capability to satisfy the conditions of heirship laid down by the ordinary Hindoo Shastras. Such a custom is, on the face of it, quite different from that established by the decisions relied upon by the learned Deputy Commissioner, and we are therefore unable to see how those decisions can help the plaintiff in the smallest degree, either directly or indirectly.

If, therefore, we leave aside the two decisions above referred to, the only other evidence produced by the plaintiff of which we need take any notice in our judgment is the testimony given by his witnesses. We are of opinion, however, that this testimony is entitled to no weight whatever, and we feel little hesitation in making this remark, not only because the learned Deputy Commissioner who examined those witnesses, and who had therefore the best opportunity of judging of their credibility, does not seem to have placed any reliance upon their evidence, but also because the insufficiency of that evidence was virtually conceded before us by the pleader who argued this case on behalf of the plaintiff. It is true that the said witnesses all start with the assertion that Jonardun Sahee, Jeetnath Sahee, Joynath Sahee, and Luchmeenath Sahee are the four persons who are entitled to succeed to the estate left by Deonath Sahee, deceased, but we think that they have completely failed to furnish us with any reliable materials, on the strength of which that assertion can be deemed sufficient to prove the custom relied upon by the plaintiff. The first witness Sreenath Sahee mentions only one instance in support of the said custom. He says first of all: "It is a custom "in vogue in the family of both parties "that the brothers become entitled to equal "shares. The eldest son does not receive the "whole property." This statement is, as we have already observed, by no means sufficient to prove the plaintiff's case. He, the witness, then goes on to say: "Sham Soonder Sahee "had (3?) sons; Munee Sahee, Hem Sahee, "Lochun Sahee, and Dheanee Sahee were his "sons. Lochun Sahee died leaving no issue; "whereupon his three surviving brothers, *viz.*, "Munee Sahee, Lochun Sahee, and Dheanee "Sahee received his property." This statement seems to be inconsistent on the very face of it, and it is scarcely necessary to observe that it would not advance the plaintiff's case in the least, even if we accept it as true. The second witness Lall Moheep Narain says: "It is a custom in vogue in "the family that, if one of four brothers die "without issue, the three surviving brothers "divide the share left by him equally among "themselves, and not give the whole to the "eldest brother." It is clear that the present case is not one between brothers, and it is therefore beyond all question that the above statement is wholly beside the question upon which the plaintiff's claim depends. The witness then goes on to state that he is a stranger to the family, and

mentions the case of one Anund Sahee, who is admittedly an illegitimate member of the family.

The third witness Pudum Lochun Sahee is no doubt a member of the family; but his evidence is not a whit better than that of the two preceding witnesses. After stating that the plaintiff is entitled to a fourth share of the estate left by Deonath Sahee, this witness goes on to say: "Sham "Soonder Sahee was the brother of Bul-"bhuddur Sahee. Sham Soonder Sahee had "three sons—to wit, Nuthoo Sahee, Kaloo "Sahee, and another whose name I do not "know. The heirs of Nuthoo Sahee are "Bhoopnath Sahee and Indernath Sahee, "&c., &c. The property left by the son "having no issue was equally divided by "the heirs of Nuthoo Sahee." Now it is admitted on both sides that neither Nuthoo Sahee nor Kaloo Sahee was the son of Sham Soonder Sahee, and it is therefore perfectly clear that the whole of the above statement made by the witness must fall to the ground. On cross-examination, the witness was obliged to admit that, with the exception of the case of Nuthoo Sahee and Kaloo Sahee, "there was no one dying without issue to his knowledge."

The fourth witness Deonath Sahee says: "Perhaps Sham Soonder Sahee had four "sons, of whom two were blessed with "children, and two left no offspring; when "two of them died, leaving no male issue, "the surviving two divided their property "between themselves," and he adds towards the end of his deposition: "If one of four "brothers die without leaving any offspring, "his surviving brothers get his property "equally divided. *I have never seen such a* "*case.*" It is manifest that statements of this description are too worthless to require any comments.

The fifth and last witness, whose testimony has any bearing on the point under our consideration, is Rughoobur Sahee. He says: "Sham Soonder Sahee had four "sons; two of them, Nuthoo Sahee and "Hem Sahee, have left their children, and the "other two have died without issue. Nuthoo "Sahee and Kaloo Sahee took their pro-"perty; they lived in commensality." It is scarcely necessary for us to repeat that these statements are incorrect, for it is admitted that Nuthoo Sahee was not the son of Sham Soonder Sahee.

The above is all the evidence which the plaintiff has produced to prove the custom upon which he has thought fit to rest his case. The defendant has, on the other hand, produced several witnesses in support of the custom relied upon by him, and we are bound to say that those witnesses have clearly proved that, in two instances at least, the said custom was followed in Thakoor Bulbhuddur Sahee's family. Whether the evidence given by the said witnesses would have been deemed sufficient, if the burden of proof had been primarily upon the defendant, is a question, which we need not pause to determine. But it seems to us perfectly clear that it is, at any rate, quite strong enough to rebut the case attempted to be made out by the witnesses produced by the plaintiff.

There is another point in the defendant's case with reference to which we wish to make a few remarks. It seems to be admitted on both sides that, according to the custom prevalent in the eldest branch of Thakoor Aynee Sahee's family, the property left by a childless member devolves on the eldest or, in other words, on the member who is in possession of the guddee, and who is, therefore, called the "guddee thakoor." Now, the position occupied by the defendant in Thakoor Bulbhuddur Sahee's branch of family appears to be precisely similar to that occupied by the guddee thakoor in his own branch, it being admitted on both sides that he, the defendant, is the thakoor, and that the junior members of his branch of the family pay the rents due from them on account of the shares in their possession through him. Under such circumstances, the defendant has every right to contend that the two branches above referred to, being descended from the same stock, the same custom must be presumed to obtain in both of them, until the contrary is proved by the clearest and most satisfactory evidence. The learned Deputy Commissioner in dealing with this argument observes as follows:—

"The defendant further places great re-"liance on the decision of the 23rd February "1815, exhibit No. 3 for the plaintiff, in the "it was ruled in that case that Rughoonath "Sahee, who was the head of Juggurnath "Sahee's family, that is, the eldest branch, "was entitled to succeed to the property of "another junior member of his family who "has died without issue, thus showing this "to be the family custom. This, no doubt, "was held to be the custom in the family of "Juggurnath Sahee; but the plaintiff's con-"tention is that the same custom is not pre-"valent in Bulbhudder Sahee's family, and

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it certainly does not seem to me to follow as a matter of course that, because a custom prevails in Juggurnath's family, that is, the Thakoor's family, it should therefore prevail in Bulbhuddur's family. On the contrary, it has been clearly shown before that one custom at any rate, *viz.*, the one of the direct heirs of the eldest branch holding a larger share than those of the younger branches, and succeeding to the title of thakoor, is not applicable to Bulbhuddur's family, and it seems to me, in the absence of all reliable evidence, more reasonable to argue that the other custom also is not applicable than that it is."

But we do not think that this is a fair way putting the argument. The presumption rather is that both the branches, ing offshoots of the same family, are erned by the same custom until the contry is proved, and it does not follow that, cause they differ in respect of one partiar custom, they must necessarily differ in pect of every other.

It has been argued that the plaintiff is, at rate, entitled to take his stand upon the inary Hindoo law of inheritance, inasch as his father Jonardun Sahee appears e the nearest sapinda of Deonath Sahee. are of opinion that this was not the case ch the plaintiff attempted to make out in Court below, and we cannot, therefore, w him to fall back upon it at this late e of the proceedings. It is true that e are some passages in his plaint in which rence is made to "the Hindoo Law" and the indoo Shastras;" but the whole context of document leaves no reasonable doubt in mind that those passages were introduced merely for the purpose of giving addiial force and validity to the special custom which he based his suit, it being a trine both of that law and of those shasthat "immemorial custom is transcendant ." Were it otherwise, we cannot underd why the plaintiff contented himself claiming only a fourth share of the proies in dispute, or why it was that he owledged the right of Jeetnath Sahee, Joynath Sahee, and of Luchmeenath ee to participate in those properties, it is perfectly clear that no such right d possibly be claimed by those individuals er the ordinary Hindoo law of inherit-. Indeed, the very passages in which plaintiff appeals to the Hindoo Shastras pport of his father's right to succeed to rth share of the properties in question affirm the right of Jeetnath Sahee, of Joynath Sahee, and of Luchmeenath Sahee to obtain equal shares in those properties, and this fact alone is sufficient to show beyond all reasonable doubt that, in invoking the said shastras, the plaintiff had no intention whatever to rely upon the ordinary rules of succession laid down therein.

Then again the issues upon which the plaintiff went to trial in the lower Court have no reference whatever to the said rules, nor is there a particle of evidence on the record to show that his father, Jonardun Sahee, is the nearest heir of Deonath Sahee. Suppose, for instance, that there is a daughter's son of Deonath Sahee living? It is clear that in such a case Jonardun Sahee would not have the slighest pretence for saying that he is entitled to claim any part of the disputed properties under the ordinary Hindoo law of inheritance, and this circumstance alone is sufficient to show danger of allowing the plaintiff to set up a new case, which was never put forward by him in the Court below.

Lastly, we wish to observe that the very nature of the properties in dispute is sufficient to raise a strong presumption against the theory of their being governed by the ordinary rules of succession laid down by the Hindoo law. Those properties, it should be borne in mind, were held by Deonath Sahee under a grant for maintenance, and it would be *primâ facie* inconsistent with the nature of such a grant to hold that they are subject to such rules, for they might, on such a hypothesis, devolve upon such relatives as maternal uncles, maternal uncle's sons, &c., and thus be lost to the family for whose support they were originally intended. It seems to be admitted on both sides that the representative of the eldest branch of Thakoor Aynee Sahee's family, or, in other words, the guddee thakoor, would have been entitled to resume the disputed properties if there were no male descendants of Thakoor Bulbhuddur Sahee living, and this admission coupled with the fact that both parties were agreed in the Court below in resting their respective cases, not upon the ordinary Hindoo law of inheritance, but upon custom, shows beyond all doubt that it would be highly improper to allow the plaintiff to fall back upon that law at this late stage of the proceedings.

Holding this view of the case, we do not think it necessary to express any opinion on the second and third issues, and we, accordingly, reverse the decision of the Deputy Commis-

sioner, and dismiss the plaintiff's suit with costs both in this Court and in the lower Court.

The 13th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Breach of Contract—Damages—Act XIV. of 1859, s. 1, cls. 9 and 10.

Case No. 144 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 21st March 1872.

R. P. Brooke (Plaintiff), *Appellant,*

versus.

Thomas Michael Gibbon and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Moonshee Mahomed Yusuf for Respondents.

In a suit to recover a sum of money (principal and interest) on account of rent paid for a certain mouzah which had been farmed out to plaintiff by defendant No. 1, but of which plaintiff could not get possession:

HELD that the cause of action as laid in the plaint was a breach of contract on the part of the principal defendant, and the action was one for damages falling under Act XIV. of 1859, s. 1, within the meaning of cl. 9 if the contract of lease was verbal, and within cl. 10 if it was in writing:

HELD that the case was not that of a suit for breach of an *implied* contract as distinguished from a contract of actual agreement, and that the obligation of the defendant to make good the loss caused to the plaintiff was not one merely which the law raises upon a state of circumstances independently of any actual agreement.

Phear, J.—IN this case there has been no trial of any question of fact in the Court below; nor any admissions of fact between the parties. But the lower Court has dismissed the plaint on the ground that, having regard to the nature of the cause of action upon which the plaintiff comes into Court, the suit is barred by lapse of time. Unfortunately, the plaint is for some reason or another exceedingly vague and ill-drawn. But it states expressly that the plaintiff claims to recover Rs. 5,000 principal, and Rs. 3,275 interest thereon, on account of rent paid for a certain mouzah Bunkutwa Bibee. And it further states that the particulars are that this mouzah, along with other mouzahs, was farmed out by the first defendant to the Roopoleah Factory (which is represented by the plaintiff) from 1272 to 1278 Fuslee; that the factory has invariably paid rent of the said mouzah up to 1273; but that the mouzah in question had, from a previous time, been in the farm of the defendant No. 2; and that consequently the factory, that is, the plaintiff, could not get possession of it.

We suppose that the ordinary meaning is to be attributed to the words here used "*farmed out,*" and that the statement is in effect that the mouzah was let on lease by the first defendant to the plaintiff. And indeed, the learned Advocate, who has appeared for the appellant, admits that the cause of action is founded upon a lease of this mouzah, together with others made by the defendants to the factory. If this be so, it seems to us that the cause of action laid in the plaint is simply a breach of a contract on the part of the principal defendant in this particular, namely, that while he had leased the specified mouzah with other mouzahs to the plaintiff, and the plaintiff had duly paid rent therefor according to the terms of the lease, yet the defendant did not, as he was bound by the contract to do, give this mouzah into the possession of the plaintiff.

We say bound "by this contract," because unless he was bound by the terms of the lease, express or implied, to give possession, the plaint does not appear to disclose or point to any other ground of obligation on his part to give possession, and therefore fails to show a cause of action.

The plaint ends by stating that the cause of action arose on the 24th October 18[illegible]. And it seems that the plaint was filed on the 17th February 1871. Thus more than three years had elapsed from the time when, according to the statement of the plaint, the cause of action had accrued to the plaintiff up to the time when the plaint was filed.

If the interpretation of the plaint which we have just made be accepted, and we do not see how any other can be reasonably put upon it, then it would seem that the cause of action even accrued some time prior to the 24th October 1867.

The Subordinate Judge thus states his reason for thinking that the suit, which the plaintiff has brought, is barred by lapse of time.

"I consider this suit barred both under "the old and new laws of limitation; "under clause 9, section 1, Act XIV. "1859, a suit for money due on the breach

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y contract, where no written engagement repay the money exists (as in the present se) should be instituted within three ars from the time when the breach of ntract, in respect of which the suit is ought, first took place. Now, in the esent case, the plaintiff claims a refund of e thika rents paid for 1272-73 Fuslee, this allegation of a breach of contract t plaintiff's factory never obtained possion of mouzah Bunkutwa Beebee that d been leased to the factory above stated; d, therefore, the plaintiff is entitled to s refund, in other words, that, on defendt's failure to fulfil his side of the conct, the law *implied* upon his part a ding engagement to pay back the oney; consequently, it is clear that this tion prescribing three years' limitation plies in this case."

appears to us that the Subordinate e is substantially right in his result, gh not entirely so in his reasoning. have already said that the plaint as we it, amounts to a complaint that the prinl defendant has not performed his side certain contract of lease; and on ground the plaintiff seeks to recover ages assessed at such an amount as will, fect, be a refund of the money which, he iders, he has paid in respect of this cular mouzah without return. We think is simply a suit for breach of contract h falls within the meaning of the 9th e of section 1, Act XIV. of 1859, if contract of lease was verbal; and withat of the 10th clause, if it was in ng; the plaint does not state whether the act was verbal or in writing.

his is not, to our mind, the case of a suit ght for breach of an *implied* contract as nguished from a contract of actual agreet within the special meaning given to term *implied* contract by the learned es of the Bombay High Court who led the case which is reported in the Volume of the Bombay High Court rts, page 16. As we understand the ent case, the obligation on the side of defendant towards the plaintiff on the which have occurred is an obligation ake good the loss which occurred to the tiff in consequence of his, the defendant's, h of a contract made by an actual ement of lease between the parties. It t merely an obligation which the law upon a state of circumstances inndently of any actual agreement between arties to be affected by it.

It appears to us, therefore, that the judgment of the Court below was in the result correct, and that this appeal must be dismissed with costs.

The 13th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Possession—Presumption—Procedure.

Case No. 925 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 10th May 1872, reversing a decision of the Moonsiff of Bishenpore, dated the 27th July 1871.

Boiddo Nath Mokoor (Plaintiff), *Appellant,*

versus

Dumoyuntee Debia and another (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Juggadanund Mookerjee, Umurendro Nath Chatterjee, and Grish Chunder Mookerjee for Respondents.

In a case of disputed ownership where the question was whether a plot of land belonged to plaintiff's or to defendant's mouzah, and the Court of first instance found that, in a series of transactions between the Revenue officers of Government and the owners of these two mouzahs, the land had been treated as a portion of plaintiff's mouzah without objection on the part of defendant: HELD that the Lower Appellate Court was wrong in assuming that plaintiff was not in possession, merely because he had failed to prove that he had taken any produce of this particular portion of land.

Markby, J.—THE question in this case is a simple question as to whether a certain plot of land, being about 40 beeghas of jungle land, belongs to the plaintiff's mouzah Chowkunda or to mouzah Khodrah, of which the defendant is the putneedar. The Moonsiff in the opening part of his judgment makes an observation upon the plea of limitation which possibly is not strictly correct; but what, we think, he means to say, is that this is a suit which is to be decided, not upon the question of limitation, but on the general merits of the case; and in that we think he was right. Then proceeding upon that, we understand him to say that, upon the evidence before him, he found that in a series of public transactions which took place between the Revenue officers of Government and

the owners of these two mouzahs on a number of successive occasions, this land was treated as a portion of mouzah Chowkunda, whereas, on the other hand, when the defendant's mouzah was demarcated, this land was not included therein. We understand the Moonsiff to find upon that that this land is a land belonging to the plaintiff's mouzah Chowkunda, and not to the defendant's mouzah Khodrah. The Lower Appellate Court gets rid of that finding, as far as we can understand his judgment, simply upon this ground that the plaintiff has not proved his possession of this particular piece of land, that is to say, he has not proved by oral evidence any taking or cutting of trees, or taking any other produce on this particular portion of the land, that being the only act of ownership which the nature of the land would admit of. There, we think, the Lower Appellate Court has clearly made an error. The general possession on one side of the plaintiff of his mouzah, and on the other side of the defendant of his mouzah was not in dispute, and as soon as it is established that this land is part of the plaintiff's mouzah, the presumption that he was in possession of it in the absence of any evidence to the contrary, is almost irresistible. We think the Lower Appellate Court was wrong in assuming that, merely because the plaintiff failed to prove that he had taken any produce of this particular portion of the land, he was not in possession. He had, as pointed out by the Moonsiff, shown that, whenever the question of ownership of this portion of the land came into question, he successfully asserted that it belonged to him, whereas the defendant, who must have known at any rate when his own land was demarcated, that his title was not acknowledged, never raised any objection. The question, of course, is one of fact which we cannot deal with in special appeal, and we cannot accept the present decision of the Lower Appellate Court as satisfactory.

We, therefore, remand this case to the Judge, and direct him to consider the whole case as it has been considered by the Moonsiff, and to decide it accordingly.

The 13th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Khatta-books—Settlement of Accounts—Stamp Paper.

Case No. 1066 of 1872.

Special Appeal from a decision passed the Deputy Commissioner of Manbhu dated the 25th April 1872, reversing decision of the Moonsiff of Nakh dated the 1st September 1871.

Grindra Coomar Dutt Chowdhry (Plaint *Appellant,*

versus

Mohessur Bhuttacharjee (Defendant), *Respondent.*

Baboo Gopaul Lall Mitter for Appellan

Baboo Mohinee Mohun Roy for Respond

Where two parties having dealings think it necess to inspect the state of accounts between them, and debtor inspects the books of the creditor, and signs th in acknowledgment of what is due from him, he be sued on such settlement of account without a executed on stamp paper.

Markby, J.—This is really a very sim case. The plaintiff sued the defendant was his gomashta, claiming a sum Rs. 1,153-12-3 and interest, *minus* Rs. which has been paid off on account. appeared that there was some disp between the plaintiff and the defenda and the plaintiff's case was that he dismis the defendant from his service on the 1 January 1871; and that upon that date account was made up between them show the above amount to be due from the defe ant. The defendant stated that he only liable for Rs. 155-2; he claimed set off the wages which were due to up to the time when the suit was brou alleging that he was still in the plaint service; and he also contested certain p tions of the plaintiff's claim. The plain in support of his case put in a khatta-bo which contains an account signed by defendant in which he states that, havi understood this account, that is, the acco which is made up in the khatta-book, acknowledge to have received from the plai iff Rs. 1,153-12-3. Now, upon that, Moonsiff, notwithstanding this would pear to be an account finally settl thought proper to go into the question as whether or not the defendant was rea liable for certain items which are mention in the account. *Primâ facie* it would be necessary to go into that question; b he thought proper to do so, and finding th the contention of the defendant in that spect failed, gave the plaintiff a decree the amount which he claims subject to payments on account, but without interest.

When the case came before the Deputy missioner, he, as it appears to me, wholly onceived the matter. He says that laintiff, in attempting to sue upon this ement of account on a stamp of one only, is attempting to evade the stamp and that he ought to have a bond uted upon a proper stamp as required he amount claimed.

know of no such requisition. This is of the most ordinary transactions of trade is country. Two parties having deal- and thinking it necessary to investigate tate of accounts between them, the inspects the books of the creditor, fter inspection of the accounts, he signs knowledgment of what is due from him. has always been treated, as far as I am of, subject of course to certain excep- as conclusive evidence between the s as to what is due. Indeed, it is ad- , and very properly admitted by the l for the respondent, that the Deputy missioner's judgment in that respect t be supported. It seems to me that the of the plaintiff was really not met at all e defendant, and the Deputy Commis- has wholly misconceived what that case and upon that signed and settled account, laintiff is clearly entitled to a decree the Moonsiff gave him.

e judgment of the Deputy Commis- will be set aside, and the judgment e Moonsiff restored. The respondent pay the costs both in this Court and in ourts below.

rch, J.—I concur.

The 15th March 1873.

Present:

Hon'ble Sir Richard Couch, *Kt., Chief stice,* and the Hon'ble F. A. Glover, *dge.*

XIII. of 1861, s.26—Act XIV. of 1859, s. 15 —Appeals—Jurisdiction.

Case No. 973 of 1872.

al Appeal from a decision passed by Subordinate Judge of Bhaugulpore, d the 14th March 1872, reversing a sion of the Moonsiff of Monghyr, d the 20th May 1871.

Hurdyal Singh and others (Defendants), *Appellants,*

versus

Kunhya Lall and others (Plaintiffs), *Respondents.*

Moulvie Syud Murhumut Hossein for Appellants.

Mr. R. E. Twidale for Respondents.

Although Act XXIII. of 1861, s. 26, bars an appeal from an order or decision passed in a suit instituted under Act XIV. of 1859, s. 15, yet where an appeal was made in such a case, no objection taken, and the appeal decreed, the High Court refused to interfere, the Lower Appellate Court's decree having given the plaintiff that the first Court ought to have given.

Couch, C.J.—The alleged title of plaintiff is founded upon a succession to the property of Keramut Ali, who must have died before the year 1819 at the latest, because we find that at that time the name of his grand-daughter, Mehroonnissa, the daughter of Porana, was entered in the register with the names of Mussamut Doodun, another daughter, and some others. The plaintiff states that having become the owner by purchase of one share in December 1848, he took possession of it; that he purchased another share on the 5th of November 1857, and took possession of that; and that he was dispossessed in November 1870. The Subordinate Judge has found that the plaintiff had been in possession for more than twelve years when he was dispossessed. He was dispossessed in November 1870; and he brought his suit in December of the same year.

If the plaintiff had been advised, as he should have been, to rely upon the provisions of section 15 of Act XIV. of 1859, he would have been entitled to recover possession notwithstanding any title that the defendant might set up. It seems that provision of the law was overlooked, and the Moonsiff dismissed his suit.

It is true that by section 26 of Act XXIII. of 1861 no appeal lies from an order or decision passed in a suit instituted under section 15 of Act XIV. of 1859; but here the appeal was made, and no objection was taken to it on that ground by the defendant. The Subordinate Judge has made a decree in favor of the plaintiff, relying partly upon the possession for more than twelve years. The judgment is obscure in regard to the extent of the share to which the plaintiff may have become entitled by his purchase; but when we look at the length of time which elapsed from the death of Keramut Ali, when the

property would be divided, and the possibility of various transactions taking place between the numbers of the family during that time until 1848 when the plaintiff first purchased, it is a case, I think, in which great effect ought to be given to the plaintiff having had uninterrupted possession for more than twelve years. It is such evidence of title as ought to prevail where the title is obscure, and transaction may have been entered into of which no record has been preserved. It is true the plaintiff could not have appealed against the decision of the Moonsiff dismissing his suit, if it had been instituted under section 15 of Act XIV. of 1859; but now he has obtained a decree in his favor giving him what the Moonsiff ought to have given, we are at liberty, I think, in disposing of the special appeal, to look at that circumstances. For that reason, I think the appeal should be dismissed with costs.

Glover, J.—I concur.

The 17th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Rent-suits—Intervenors—Act VIII. of 1859, s. 73—Secondary Evidence—Consent.

Cases Nos. 601 to 608 of 1872.

Special Appeals from a decision passed by the Judge of Gya, dated the 30th December 1871, affirming a decision of the Moonsiff of that District, dated the 1st October 1871.

Choolie Lall and others (Defendants), *Appellants,*

versus

Kokil Singh (Plaintiff), *Respondent.*

Messrs. J. T. Woodroffe and *R. T. Allan, Baboo Mohesh Chunder Chowdhry,* and *Moonshee Mahomed Yusuf* for Appellants.

Mr. C. Gregory and *Baboos Romesh Chunder Mitter, Chunder Madhub Ghose,* and *Boodh Sen Singh* for Respondent.

In any suit for rent against a tenant by a person claiming as landlord, the Court ought not to put on the record a person who prefers opposing claims to the plaintiff unless it sees that his position, as such opponent, would be seriously compromised by the result of a decree in favor of the plaintiff, *e.g.*, as when the opposing party claims to be in actual possession by receipt of rents.

When the best evidence is not given, and the opposite party does not object to the secondary evidence put in, the decree must stand on such evidence as is before the Court, notwithstanding that it exhibits marks of inferiority, and the absence of the best evidence is unaccounted for.

Phear, J.—These cases have occupied the Court some considerable time; and I think that nearly every material point connected with the relations between the parties has been very fully discussed before us. The result to my mind is that the matter is an extremely simple one, and I see no occasion for taking any time to consider the decision which we ought to give.

The plaintiff has brought six suits against as many defendants from whom he claims rent as his ryots. One Choolie Singh intervened in all these suits, and was made defendant on the record.

Both the Courts below have given the plaintiff a decree for the rent which he asked, and we have now before us eight appeals, two preferred by two of the ryots originally sued by the plaintiff, and one in each of the six suits preferred by the intervenor defendant. It appears that of all the six ryots sued, three in the first Court admitted the plaintiff's claim to his right as landlord, and three did not. But of the three who did not so admit his claim, only two have appealed. In this way there arise eight appeals out of the six suits which are now before us.

I must remark by the way that there is at present no equivalent to the old section 7 of Act X. of 1859, in any enactment bearing upon this case. And the placing the intervenor on the record in these cases was the act of the Court, an act done in the exercise of the discretion vested in the Court by section 73, Act VIII. of 1859. By that section the Court is authorized, in any hearing of a suit, to put a person upon the record, who is not already a party to the suit in the event of its appearing that the person would be prejudiced or might be prejudiced by a decree passed between the existing parties to the suit. I need hardly add that this discretion ought always to be sparingly exercised; and that the Courts ought not to put persons on the record other than those whom the plaintiff sues without good cause for so doing. And I am disposed to say that, in any case of suit for rent brought against a tenant by a person claiming to be in the situation of a landlord, the Court ought not to put on the record a person who prefers opposing claims to the plaintiff, unless it sees that his position as such opponent would be seriously compromised by the result of a decree made in favor of the plaintiff against the party sued. That would p

ly always be the case when the opposing person in such a suit set up that he was actual possession of the property by receipt of rents from the persons whom the intiff sues, because in that case a decree in in favor of the plaintiff would effect, against him, so to speak, a partial ejectment, and would oblige him to bring a suit the disadvantage of a plaintiff out of ession in order to assert his rights; reas, by reason of his possession, he is least entitled to enjoy the property until rson with the responsibility of a plaintiff made out a substantial case against him. assume then that when the intervenor plie Singh was in this case put upon the rd, the Court had good ground for supng that he was a person already in quiet ession by receipt of rent from the per whom the plaintiff sues. At any rate e suits which are before us, it was incum no doubt upon the plaintiff in the first nce to show some ground upon which he a right to be paid rent by the original ndants. He did so by setting up that he the assignee of one Dacca Singh, who been for some time in possession and ment of the rents payable by the defend and others, and that Dacca Singh had ived these rents in the capacity of dar from one Jurreena Bibee.

e title which he set up even went furback than this. But for the moment I stop here.

appears from so much of the evidence as been disclosed to us that the plaintiff proed witnesses, who testified to the assign by Dacca Singh of his rights to the tiff; and a certain petition of Jurreena e's, the zemindar of Dacca Singh, was put in showing that she acknowledged Dacca Singh was her ticcadar, and also owledged the transfer by Dacca Singh s rights to Kokil Singh.

has been objected before us very forcibly the plaintiff was bound to prove his by the best evidence, and therefore t to have produced the deed of assign itself from Dacca Singh to him; and inasmuch as he has not done so, his ought to fail on that ground alone.

appears to me that the only thing ssary to make this objection a very tantial one is the fact that the parties tried the suit in the Court of first nce objected to the secondary evidence of kind which I have just now mentioned given, while the best evidence, namely, deed of assignment itself, was absent and not accounted for. But it does not appear that this fact occurred at all; and judging from the experience which I have had of the mode he conducting trials in the Courts of first instance, I feel certain that it is more than probable that no such objection as this was ever raised, and that the parties were content to receive this secondary evidence for as much as it is worth, without insisting that it should not be looked at until the best evidence was produced and accounted for. It is, I think, most unfortunate that the persons who are charged with the duties of conducting trials of matters of fact in the Courts of this country are not more watchful than they are in regard to the nature of the evidence which is allowed to be produced before the Courts. Very much of the want of finality in litigation which prevails, and the uncertainty which hangs about the decisions of fact effected in all our Courts, is due to this circumstance, still, as long as there is that want of care and want of skill which certainly does obtain generally in the trials of matters of fact in the Courts of first instance, we should be denying all justice between the parties if we refused to allow a decree of Court to stand upon such evidence as is before the Court, merely because that evidence exhibits unquestionably in itself intrinsic marks of inferiority, and the better evidence is out of the way unaccounted for. We will take it that the parties have chosen to come to trial upon the materials put before the Court, and all we can do is to take care that the best decision which is possible under the circumstances should be given upon those materials. This being so, I do not think that the objection which has been made by the appellants before us upon this point ought to be allowed to prevail. There is evidence, notwithstanding, that the original lease was not produced upon which a conclusion of fact can be based. The testimony of the witnesses and the petition of Jurreena Bibee are not impeached upon the ground of want of veracity. There is nothing before us to show either that the witnesses in this particular spoke untruth, or the petition itself was fabricated or not authentic; and therefore I think that the Court was justified in coming to the conclusion upon that evidence, in the absence of anything better or to controvert it, that the allegation of the plaintiff was established, namely, that he had received an assignment from Dacca Singh of his rights to receive the rents from the ryots of this mouzah.

It further appears from the findings of the Judge which have not been substantially questioned that Dacca Singh and his grantor Jurreena had for a time, Jurreena especially for a long time, enjoyment of the rents payable by the ryots of this mouzah. Dacca Singh, it seems, had two partners in his ticcadaree rights, but his defined share was eight annas, and there is ample evidence that he collected this share separately. The plaintiff only sues for eight-anna share of the rent. In this way it seems to me that the plaintiff has laid a very good *primâ-facie* case for demanding rent which he seeks to obtain from all the ryot defendants.

Then as between him and the intervenor defendant how stands the matter?

It appears to me that when once an intervenor has been put upon the record, the Court cannot well avoid trying all questions which naturally arise upon the plaints as between the plaintiff and the intervenor defendant, and it will try those questions upon the issues which are framed between the parties. The substantial question which arose upon the plaints in these cases as between the plaintiff and the intervenor was, whether or not the plaintiff, as against the intervenor, was entitled to be paid the rents which he sought from the ryot defendants. The claim of the plaintiff against the ryots might no doubt have been placed upon a footing which was entirely independent of title to property in the land. It might have been upon the footing of a special agreement between himself and the ryots, with which no third person, whatever his rights to the land to be paid for might be, could have any concern whatever. But I understand that in these cases the defendant said: You have no right to be paid the rents for which you sue on the ground which you allege, namely, that you are the owner of the mouzah, because I am in fact the owner, and I have been and am in actual possession and enjoyment of the rents payable by the ryots thereof, the defendants among the number. In that state of things, I could understand that an issue of right as regards the property might have arisen between the plaintiff and the defendant. It does not appear, however, that any express issue of this kind was in fact put into words between the plaintiff and the intervenor defendant: and the issue that was raised between them was substantially this, namely, which of the two was, up to the time of the suit, in actual enjoyment and possession of the rents payable by the ryots of this mouzah. I have already referred to the nature of the evidence by which the plaintiff made out a *primâ-facie* right to be paid those rents. The defendant's evidence according to the view taken of it by the Judge utterly failed to show that he had been, up to the time of the suit, in any sort of *bonâ-fide* possession and enjoyment of the rent; and it appears to me that nothing which we have heard urged before us would entitle us to interfere here in special appeal with the finding of the Lower Appellate Court upon that point. The question is simply a question of fact; and there has been nothing brought to my notice which serves to indicate in any way that the Judge erred in his estimate of the evidence, so far as it bore upon that question of fact. The intervening defendant did no doubt make some show of putting forward a title higher than that of being himself a mere possessor of the property, but nevertheless, as I understand, he failed or omitted to prove any title whatever from any previous owner and possessor.

Although he filed a pottah or kubooleat alleged to have been granted by one Sookraj, he abstained from putting in any evidence to support it or to prove it; still less did he show any title in Sookraj. It would thus seem that, both as regards title and as regards actual possession and enjoyment, the defendant failed to substantiate by evidence the allegations which he had made.

In view then of all these facts, it appears to me that the Lower Appellate Court has rightly come to the conclusion that the plaintiff is entitled to recover his rent from the ryot defendants, and to have a decree to that effect as against the intervening defendant.

On the whole, I think that these appeals for admittedly they are all determined in the same way as the consequence of the view which I have just now expressed, ought to be dismissed with costs.

Ainslie, J.—I concur generally in the judgment delivered by my learned brother. The circumstances of this case do not require that we should consider how far a party brought on the record under section 73 is entitled to claim a decision of the Court on any matter of title which he sets up. Whether on further consideration, I should in any way modify the view expressed by me in the judgment referred to in the course of the argument (which is reported in the 8th volume of the Bengal Law Reports, page 180).* I am not now prepared to say.

* Doyal Chunder Sahoy *vs.* Nobin Chunder Adhicary, 16 W. R. 235.

The 18th February 1873.

Present:

he Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act XX. of 1866, s. 53—Decree—Lien—Construction.

Case No. 112 of 1872.

ecial Appeal from a decision passed by the Judge of Tipperah, dated the 14th August 1871, affirming a decision of the Moonsiff of Ameergong, dated the 15th September 1870.

Asma Bibee and others (Defendants), *Appellants,*

versus

Ram Kant Roy Chowdhry (Plaintiff), *Respondent.*

Mr. J. S. Rochfort and *Baboo Sreenath Banerjee* for Appellants.

Mr. R. E. Twidale and *Baboo Nullit Chunder Sen* for Respondent.

a decree based upon a mortgage-bond, and passed er the provisions of Act XX. of 1866, s. 53, the Court t empowered to confer a lien in accordance with the d.

n ambiguous decree must be construed so as to be rmony with the words of the law.

ackson, J.—THE facts of this case are fully stated in the judgments of the two rts below. The plaintiff relied upon a chase made by him under an execution, dated December 1868, such execution g under terms of a decree, dated the 19th ust 1867, and made under section 53 of repealed Registration Act No. XX. of 6.

The defendant, who is said to be in possesof the property in dispute, relies upon evious purchase made by him in another cution-proceeding in the year 1867.

he Court of first instance considered that suit and proceedings in execution of 1867, er which the defendant had purchased, e tainted with fraud, and also held that plaintiff's purchase being made under a ee based upon a mortgage-bond, and conng a lien in accordance with such bond, ve plaintiff a preferable right to this proy. The first Court accordingly gave ntiff a decree.

On appeal, the District Judge takes the e view of the law in respect of the na of the decree of 1867 and the proceedings in execution of it. There was also a question before him as to the fraudulent character of the proceedings under which the defendant had purchased, and the Judge, although he seems to have thought that there was some foundation for what the plaintiff alleged as to that part of the case, did not come to the conclusion that those proceedings were absolutely fraudulent. But, on the other hand, he raised for the first time a different point, *viz.*, that the defendant was not himself a *bond-fide* purchaser under those proceedings, and on that ground, as well as on the ground of the plaintiff's preferable purchase in execution of his mortgage-suit, affirmed the decree of the Court below.

In special appeal the defendant impugns both these grounds of the decision.

As to the plaintiff's purchase, it appears to us clear in the first place that the Subordinate Judge, in the decree of August 1867, did not intend to declare any lien in favor of the plaintiff then before him, and in the next place that, if he had so done, the decree would to that extent be imperative, inasmuch as neither section 53 of Act XX. of 1866, nor the corresponding section of the previous Registration Act XVI. of 1864, gave the Court any such power under the summary procedure provided by those sections. Section 53 of the Registration Act (XX. of 1866) provides: "On production in Court of the "obligation and of the said record signed as "aforesaid, the petitioner shall be entitled to a "decree for any sum not exceeding the sum "mentioned in the petition, together with "interest at the rate specified (if any) to "the date of the decree, and a sum for costs "to be fixed by the Court." The decree which alone has to be looked at does not contain in express terms anything like a declaration of lien, but after ordering that plaintiff is to recover the sum sued for, goes on to say that the tumsook on which the plaintiff sued is to be held capable of enforcement as a decree. The only inference which we can draw from the use of these words is that the practice was new, and that the officers of the Court below not being familiar with it, introduced the words from the Act of 1864, which they suppose to be in consonance with the intention of the Legislature. But, if there was any doubt as to the construction which ought to be put upon the decree, if the decree was ambiguous, we think we are bound to construe it so as to be in harmony with the words of the law, and as the law does not sanction anything more than a mere decree for money, we ought

the defendants was proved, that they had proved their grant and possession, and he gave judgment in favor of the defendants. The same was the issue of the suit on the bond for rent. That was also decreed in favor of the defendants, and the bond was pronounced to be spurious. The decision in the rent-suit was in the year 1861, and it should be stated that, before that date, namely, in the year 1854, the defendants had granted to a certain Coal Company their rights in this mouzah, purporting to make them a mokurruree grant; and the Coal Company had worked the coals, had erected buildings, and carried on considerable mining operations in an open and notorious manner (which must, of course, have been perfectly well known to the plaintiffs) from the year 1854 down to the time of the commencement of this suit, which was in the year 1858. The plaintiffs laid by from the time of the decision in the rent-suit, which was in 1861, till 1868, being aware of all these works going on, without bringing any suit, and they have given no explanation of that delay.

It is under these circumstances that the present case came on for hearing. The Judge in the first instance in the present suit, in which the evidence was substantially the same as in the rent-suit, acting in a great measure upon the decision of the Assistant Commissioner in the rent-suit, came to the conclusion that these kubooleuts on the part of the plaintiffs were false. He also expressed a good deal of doubt as to the genuineness of the mokurruree grant put in by the defendants, chiefly, not entirely, on the ground of certain expressions contained in that grant, which appeared to him of a suspicious character; but he decided in favor of the defendants upon the Statute of Limitations, holding that the defendants had held. for more than twelve years before the commencement of the suit, adverse possession to the plaintiffs. On the case coming before the High Court, they overruled the decision of the Judge of the Court of first instance upon the Statute of Limitations, holding, and their Lordships are of opinion, rightly, that the Statute does not begin to run in favor of the mokurrureedar against a zemindar until the zemindar has had notice that the mokurrureedar claims under a mokurruree grant, and that in this case it was not shown that notice had been given to the plaintiffs of such a tenure twelve years before the commencement of the suit. The High Court decided in favor of the defendants upon the merits. They agree with the Commissioner in considering the case of th plaintiffs to have been a false one, and the kubooleuts forgeries, and they uphold th genuineness of the mokurruree grant. M Justice Kemp answers the objections mad by the Judge of first instance to the moku ruree grant based on the expressions con tained in it in a manner which appears t their Lordships satisfactory, and Mr. Justic Kemp their Lordships understand to be Judge well conversant with subjects of th kind.

It has been contended that the High Cou were wrong in coming to this conclusio It has been argued that the *onus* of proof o a mokurruree grant lies entirely upon th defendant, and that he is not relieved fro this burden of proof even if the plaintiff, a in this case, had failed to prove his kubo leuts, and their Lordships assent to thes propositions. The question, therefore, simply whether there were sufficient ground on which the finding of the High Court ca be supported, that the defendant had mad out his case. Their Lordships are of opinio that there were sufficient grounds to suppo the finding. The grant itself, though pe haps not proved in the most satisfacto manner, still purported to be an ancient gra and came from the proper custody. It is t a certain extent, at all events, verified by th other evidence which has been referred to, the return of the gross produce and of th receipts, and it is still further verified by th evidence which the defendants gave of lon continued possession, carrying that possessio back a great deal further than the plaintif had admitted, in fact, to the time of th grant itself, and even beyond it; and, furthe by the proof which was given by the defen ants, which their Lordships concur with th High Court in considering satisfactory, th the ancestors of the defendants were relatio of the ancestors of the plaintiffs; and th other grants of the same description ha been made to other members of the famil

It only remains to notice some evidence to admissions of the defendants, relied on o the part of the plaintiff. The first of tho admissions consists of the two documen put in by Bhugwunt Sahoy. The Assis ant Commissioner in the rent-suit treate one, if not both, of these documents as fals The High Court do not, indeed, very di tinctly say whether or not they take th view, but they content themselves generall with observing that the assignment to Bhu wunt does not appear to militate much again

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e case of the defendants, and their Lordships are not prepared to say that the High urt were wrong in coming to that conclu-n. There is, then, another document ch relied upon on the part of the plaintiffs, d that was what purports to be an authen-ated copy of a rasinamah or journal kept the Collectorate, whereby there appears to an entry of the substance of a petition d to have been filed by the defendants on 31st December 1852, in which they state t they held on lease from 1259 to 1267 lee. The original petition, of which this ports to be an abstract, is not produced, non-production is accounted for by the gation that the Court-house in which the ords were kept was burnt, and all the ords with it. How this document escaped fire, where it was kept, by whom it kept, who made the entries, there is no dence whatever. Nor is there any evi-ce of inquiries being made upon that ject. Therefore, whether or not it was sible to call the person who made the ries, their Lordships are unable to say.

Under these circumstances, their Lordships not regard the proof of this document as very satisfactory character, and they ee with the First Commissioner in his ervation that this document is, at all nts, not of sufficient value to outweigh the dence on the part of the defendants.

Their Lordships observe that no notice ever is taken of this document in either e judgments in the present suit, and they very much disposed to infer from that no substantial reliance can have been ced upon it on behalf of the defendants. be that as it may, they do not think it sufficient weight to counterbalance the dence on the part of the defendants.

For these reasons their Lordships are of nion that there was ample ground on ch the High Court were justified in find-for the defendants, and that that finding right. Their Lordships will, therefore, mbly advise Her Majesty that that judg-nt be affirmed, and this appeal dismissed h costs.

The 28th February 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

tgage-bond — Lien — Attachment — Sale — rchase-money — Act VIII. of 1859, s. 270 — t XIV. of 1859, s. 20 — Proceedings to keep ecree alive — Surplus Profits of Trust.

Case No. 240 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 30th June 1871.

Syud Nadir Hossein (one of the Defendants), *Appellant,*

versus

Baboo Pearoo Thovildarinee (Plaintiff), *Respondent.*

Mr. Advocate-General and *Baboo Bhowanee Churn Dutt* for Appellant.

Mr. J. T. Woodroffe and *Baboos Sreenath Doss* and *Bhugobutty Churn Ghose* for Respondent.

Where a form of mortgage or charge created by a bond does not vest any estate in the mortgage, but only establishes a lien as incident to the money-debt, such lien continues when the debt passes from a contract into a judgment-debt, and when such judgment-debt is assigned to another by sale of the decree.

If, at the date of the sale of the decree, the property over which the lien extends has already been attached, seeing that an attachment under a money-decree on a mortgage-bond and the mortgage-lien cannot co-exist separately in the property hypothecated, the attachment in question must be treated as enforcing the lien; and if the property is sold pending such attachment, the lien becomes transferred from the property to the purchase-moneys.

If the purchaser of the decree applies for attachment of the purchase-moneys, and his application is rejected, he may institute a regular suit to establish his title to them under Act VIII. of 1859, s. 270; but failing to do so, he forfeits his lien, both in the land and in the purchase-moneys. He does not, however, forfeit his right to execute the decree otherwise.

The proceeding intended by Act XIV. of 1859, s. 20, need not be a proceeding by a person legally and rightfully entitled to the decree, that section requiring no more than that some actual proceeding should be taken, which, if successful, would result in the discharge or partial discharge of the judgment-debt.

Where property is purchased out of the surplus profits of a trust, which are not required for the purposes of a trust, and which the trustee is entitled to retain for his own benefit, such purchase enures for his own benefit.

Pontifex, J.—On the 28th Aughran 1268, Mirza Mahomed Ali Beg borrowed Rs. 8,000 from the Mohunt Ramdossjee, and secured the same by a registered bond of that date, under which 15½ annas share of Pergunnah Pultapore in the Collectorate of Maldah was hypothecated.

On the 2nd of March 1864, the Mohunt filed a plaint against Mirza Mahomed in the Court of the Principal Sudder Ameen of Moorshedabad, and therein stated that he instituted the suit for the recovery of Rs. 11,650-14 from the mortgaged property and from other moveable and immoveable properties, as well as from the defendant.

Mirza Mahomed, by his answer, filed the 6th of April 1864, admitted the amount of

the claim, but begged for time. This was refused by the Principal Sudder Ameen of Moorshedabad, who, by his decree dated the 14th of April 1864, ordered "that the suit "be decreed, and that the plaintiff recover "from the defendant the amount of the claim "with interest."

It has been contended that this decree was a mere money-decree to which the mortgage-lien did not and could not attach, inasmuch as the Moorshedabad Court had no jurisdiction to affect land situate in the Collectorate of Maldah.

On the 4th of May 1864, the Mohunt applied, under section 285 of Act VIII. of 1859, for a certificate for executing the decree in the Civil Court of Zillah Dinagepore, within the jurisdiction of which Maldah was situate.

On the 20th of May 1864, a certificate was ordered to be forwarded to the Judge of that zillah, and on the 10th of June 1864 the Mohunt petitioned the Principal Sudder Ameen of Dinagepore, stating that he had executed the decree, and praying that the amount decreed with costs and interest might be ordered to be realized by sale at auction of the right and interest of the judgment-debtor in the zemindaree.

Under the proceedings in execution, not only the 15½ annas share of Pergunnah Pultapore, but also another property called Pergunnah Bansdowl, had been attached and directed to be sold.

Mirza Mahomed, on the 9th of September 1864, petitioned that Pergunnah Bansdowl should be released from attachment and sale, on the ground that he held it as trustee under a wuseeutnama dated the 1st Bysack 1266. This wuseeutnama it will be necessary to direct our attention to presently; but in passing it may be well to notice that it was produced and relied upon as early as the 9th of September 1864 as a subsisting instrument of trust, under which the judgment-debtor was trustee.

On the 13th of September 1864, an order was made on Mirza Mahomed's petition stopping the auction-sale; but on the 13th of December 1864, the Mohunt preferred a petition suggesting that the sale of Bansdowl might stand over, but praying that the sale of the 15½ annas share of Pultapore might be proceeded with; and, by an order of the same date, the auction-sale of Pultapore was directed to take place. In this order it is stated that the whole 15½ annas of Pultapore had been attached, and that it was unnecessary to attach it again. The date fixed for sale was the 4th of May 1865. Subsequently to such attachment, the property was attached by Poran Bibee, a judgment-creditor of Mirza Mahomed, under a decree of 1865.

In Phalgoon 1271, the Mohunt had entered into a contract for the sale of the decree of the 14th of April 1864 to Meer Hossein; but the Mohunt refusing to complete, Meer Hossein instituted a suit for specific performance in the Court of the Principal Sudder Ameen of Moorshedabad, who, on the 23rd of December 1865, confirmed the purchase by Meer Hossein. In the meantime, and before such contract had been completed, and during the pendency of the suit for specific performance, the 15½ annas of Pultapore had been sold on the 29th April 1865 in execution of Poran Bibee's decree, and had been purchased in the name of Khorshed Begum, a near relative of Mirza Mahomed, and, according to the appellant, with the trust funds held under the wuseeutnama; but, according to the respondent, with the money of Mirza Mahomed himself.

It would seem that, on the application of Mohunt or Meer Hossein, it was at first ordered that the sale-moneys should remain under attachment on the ground that the property had been first attached by the Mohunt; but upon application by Poran Bibee to release such attachment on the allegation that the execution-case of the Mohunt had been struck off, the sale-moneys were released from attachment. The execution-case of the Mohunt had, in fact, been struck off, after the sale under Poran's execution on the 4th of May 1865, by order of the Principal Sudder Ameen of Dinagepore, because the fees of the peon for promulgation of auction-sale had not been paid. But such striking-off would only affect the files of the Court and the application for sale, and would not interfere with the continuance of the attachment.

On the 12th June 1865, Meer Hossein applied by petition to the Principal Sudder Ameen of Moorshedabad, stating that the execution-case of the Mohunt had been struck off, because, during the pending of the specific performance suit, the Mohunt had been enjoined from carrying it into effect; and asking that the sale-moneys might be retained until the specific-performance suit was disposed of; insisting that the first attachment being under the Mohunt's decree, that decree must have priority, and be satisfied out of the sale-moneys.

The Principal Sudder Ameen of Moorshedabad, on the same day, after stating the

e objection could not be made in that ourt, but must be preferred in the Court hich made sale, ordered that the petition ould be rejected.

The decree of Poran Bibee had originly been passed in the Moorshedabad Court hich also had passed the decree of the ohunt. The former decree had been sent execution to the Sudder Ameen of Malh, and the latter to the Principal Sudder meen of Dinagepore.

The sale under Poran's decree had been cuted by the Court at Maldah.

On the 30th of June 1865, Meer Hossein sented a petition to the Sudder Ameen Maldah, stating the result of his petition the Moorshedabad Court, and asking that sale-moneys which were then in the dah Collectorate might be retained, notstanding that a cheque for the same had n given to Poran Bibee.

The Sudder Ameen of Maldah, on the 1st July 1865, held that, in consequence of execution-case having been struck off, attachment by the Mohunt was annulled, therefore rejected the petition. Against h rejection Ameer Hossein appealed to Judge of Dinagepore, who, on the 9th December 1865, dismissed the appeal on ground that he had no jurisdiction as no eal could lie. The result was that the -moneys were paid out to Poran Bibee. ing these proceedings, the specific-permance suit between Meer Hossein and Mohunt remained undecided, and it is one the points to be determined in this appeal, ther these proceedings by Meer Hossein, le only entitled by contract to the decree the 14th April 1864, were sufficient to p such decree alive under section 20, Act V. of 1859.

The respondents, having obtained a decree inst Meer Hossein on the 29th of June 7, applied for the auction-sale of Meer sein's right and interest in the decree ained by the Mohunt, dated the 14th of il 1864, against Mirza Mahomed. By a -certificate, dated the 1st of February 9, which recites that the decree of the h of April 1864 had been executed by Bibee Moneerun in Zillah Maldah in No. of 1868, and further recites that the ion applied for by the respondent took e on the 29th of January 1869, it was fied that the respondent herself had ome the purchaser of the said decree, that all Meer Hossein's right and interest ein had passed to her.

It would appear from a petition of the appellant, dated the 21st of July 1868, to the Court at Moorshedabad, and from the 5th paragraph of his written statement, that prior to the 2nd of April 1868, Meer Hossein had transferred the decree of the 14th of April 1864 to his mistress, the said Bibee Moneerun, benamee, with the object of preserving it from decree-holders against himself; and that Bibee Moneerun, with a view to realize the amount due under the transferred decree, had, on the 2nd April 1868, applied to the Court of Moorshedabad for notices to be issued under section 216 of Act VIII. of 1859, and, notices having been accordingly issued, that the appellant filed his petition of objection thereto.

The appellant in his written statement alleges that Moneerun's application for execution was refused on the 4th of May 1868, but that date is inconsistent with his own petition of objection presented on the 21st July 1868, and also with the petition of Meer Hossein, dated the 3rd of November 1868, to the same Court, in which Meer Hossein stated a sale by deed by him to Bibee Moneerun, and that she had executed the decree, and asked that her name might be substituted for his in the execution-case.

The final order in this petition does not appear in the printed record, but we have been informed that it was made after the sale-certificate to the respondent, *viz.*, on the 3rd of February 1869, and that the application by Meer Hossein was refused on the ground that the transfer to Moneerun was simply benamee.

Another question to be determined in this appeal is, whether the proceedings by Moneerun kept the decree of the 14th of April 1864 alive. During the interval, Mirza Mahomed appears to have died. As before mentioned, he had been a trustee under the will or wuseeutnama of 1st Bysack 1266 (13th April 1859) executed by Kharoonnissa, by which Pergunnah Bansdowl and other properties, moveable and immoveable, were, so far as the same were made subject thereto, devoted to certain trusts, which, if not precisely wuqf, were of that nature; and which will was acted upon as valid long before the decree against Mirza Mahomed of the 14th of April 1864. It appears that by another wuseeutnama, dated 8th Bhadro 1271 (23rd August 1864), Mirza Mahomed, being about to proceed on a pilgrimage for three years, appointed the appellant, Nadir Hossein, his sister's son, trustee for three years of Kharoonnissa's will. A recital appears in this

document, which has been relied upon to the effect that the trust-income was insufficient to meet the expenses of the trust, and the income is stated at Rs. 3,296.

By his will dated the 20th May 1868, Mirza Mahomed appointed Nadir Hossein trustee in his place of Kharoonnissa's will. Mirza Mahomed's will recites that 15½ annas-share of Pergunnah Pultapore had then recently been purchased, and formed part of the trust-property. Immediately after her purchase of the decree, *viz.*, on the 4th of February 1869, the respondent applied for execution to the Principal Sudder Ameen of Moorshedabad against property in that district, and objections to such execution were made separately by Nadir Hossein, the trustee, and by the heirs of Mirza Mahomed.

The objection of the appellant, Nadir Hossein, was numbered 43 of 1869, and alleged that he was not the heir of Mirza Mahomed, and that he was not in possession of any property left by Mirza Mahomed; but that he was in possession of trust-property under Kharoonnissa's will as trustee in succession to Mirza Mahomed. The order upon this objection, dated 29th May 1869, was that Nadir Hossein should be released from liability under the decree. Such order could only apply to or affect property in the district of Moorshedabad.

The objection of Mirza Mahomed's heirs (among whom Nadir Hossein was apparently not included) was numbered No. 23 of 1869, and among other grounds raised the question that execution was barred by limitation. This objection was rejected by the Principal Sudder Ameen of Moorshedabad on the 29th of May 1869, on the ground that the Mohunt's execution-case having been struck off on the 4th of May 1865, and Bibee Moneerun having applied for execution on the 2nd of April 1868, she being, in fact, the nominee of Meer Hossein, such application by her must be considered as sufficient to keep the decree in force.

The respondent subsequently appears to have obtained an attachment of Pergunnah Pultapore in the Zillah Court of Dinagepore, whereupon Nadir Hossein again, under section 246, made his objection that the property was trust-property, and, on the 7th of June 1870, the Judge of Dinagepore allowed the objection, and released Pergunnah Pultapore from attachment. In consequence of such release, the respondent instituted the suit in which this appeal arises in the Court of the Subordinate Judge of Dinagepore on the 6th of December 1870, insisting that the original mortgage-lien on Pultapore under the bond of the 22nd Aughran 1268 was still subsisting, and was incident to the decree of the 14th of April 1864, and must override all alienations by Mirza Mahomed, or persons claiming through him; and praying for a sale of the mortgaged premises in execution of the decree of the 14th of April 1864.

As Nadir Hossein, in his objections in the Moorshedabad and Dinagepore Courts, had not raised the question that 15½-annas-share of Pultapore had been purchased under Poran's sale in execution out of the profits of the trust-property, but had only alleged that such share was trust-property, and that he had succeeded to it as trustee under Kharoonnissa's will, the respondent in the plaint could not raise the question of the validity of the purchase under Poran's execution. And as in her plaint the respondent makes no mention of the proceedings in execution by Meer Hossein in 1865 and by Moneerun in 1868, and does not attempt to show that any proceedings in execution had been taken to keep the decree of the 14th of April 1864 alive, between the date thereof and her own purchase of it, she must have assumed that if she was entitled to the mortgage-lien, her right to sue in respect of the mortgaged property would not be barred for twelve years notwithstanding that the mortgage-debt had been changed into a judgment-debt by the decree of the 14th April 1864, and this assumption would seem to be correct, and is in accordance with the judgments of Mr. Justice Macpherson in the cases of Surwar Hossein *vs.* Shahzada Golam Mahomed, 1 Weekly Reporter, page 171, and Bissonath Mookhapadhya *vs.* Gosain Doss Bura Madub, 3 Bengal Law Reports, App., page 140.

The appellant by his written statement in this suit for the first time set up the case that the property had been purchased under Poran's execution out of the profits of Kharoonnissa's trust-property. He further insisted that the decree of the 14th of April 1864 was a mere money-decree, which did not carry with it the mortgage-lien; and that proceedings in execution under such decree were barred by limitation, inasmuch as Moneerun's application for execution on the 2nd of April 1868 must be treated as fraudulent and inoperative. He also insisted that as Meer Hossein failed to establish by suit his right to the purchase-moneys when the property was sold in 1865 under Poran's execution, and allowed her to obtain such

money by submitting to the rejection of his claim under section 270, his mortgage-rights (if any) over the property thereupon ceased.

The Subordinate Judge settled five issues in the suit, which are in effect as follow:—

1.—Whether the decree sued upon was barred by limitation.

2.—Whether the respondent had a mortgage-lien upon the property.

3.—Did the property belong to Mahomed Mirza.

4.—Whether the respondent was bound by the act (default) of Meer Hossein.

5.—Whether the respondent was entitled to set aside the alleged trust under which the appellant claimed to hold the property.

On the fifth issue, which, in a particular view of the case, is a material issue, evidence appears to have been taken, but the Subordinate Judge having decided the case on other grounds did not give any judgment on such issue, though he incidentally expressed an opinion upon it.

The Subordinate Judge found on the first issue that the decree was not barred by limitation, inasmuch as the proceedings by Meer Hossein in 1865, and by Moneerun in 1868 were sufficient to keep it alive. But he seems to have partly founded his decision with respect to Moneerun's proceedings on a decision of the 9th of January 1869, to which he says Nadir Hossein was a party, but which does not appear in the record.

On the second issue he found that the mortgage-lien still subsisted, and had passed to the respondent, and must override any sale under Poran's decree; at the same time incidentally expressing his opinion that the alleged purchase with trust-money was so palpably suspicious that proof of its *bonâ fides* must be adduced before it could be allowed to stand against Mirza Mahomed's judgment-creditors; one ground for such suspicion being the fact that it was purchased in the name of Khorshed Begum, a relation of Mirza Mahomed, instead of in the name of Nadir Hossein, who was then acting as trustee under his temporary appointment by the deed of the 23rd of August 1864.

On the third issue the Judge found what is not denied, that the property at the date of the mortgage belonged to Mirza Mahomed. And on the fourth issue he held that Meer Hossein's default in letting Poran get the purchase-money in 1865 did not discharge the mortgage-lien.

Against this decision the defendant has appealed, insisting on the same objections substantially as those taken in his written statement.

The issues settled in Court below are sufficient for the determination of this case.

Taking the second and fourth issues together, I am of opinion that, as the form of mortgage or charge created by the bond of 28th Aughran 1268 did not vest any estate in the Mohunt, but only established a lien as incident to the money-debt, such lien contained an incident of the debt when it passed from a contract-debt into a judgment-debt, and so continued when such judgment-debt was subsequently assigned to Meer Hossein, otherwise the right to the lien must have remained in the Mohunt. But as his judgment-debt represents the full amount for which Mirza Mahomed and the land were liable to him, and as he had transferred such judgment-debt to Meer Hossein for what must be taken to have been its full value, he could not retain the lien either against Mirza Mahomed or Meer Hossein. He could not retain it against Mirza Mahomed, for he had no longer any debt or demand against him or the lands, and as Mirza Mahomed had neither done nor paid anything to discharge the lien, it must still have continued to exist. But the only possible existence it could have would be as incidental to the judgment-debt; and therefore I am of opinion that the sale of the money-decree of the 14th April 1864 passed with it the lien under the bond of the 28th Aughran 1268. The cases before cited from 9 Weekly Reporter, 170, and 3 Bengal Law Reports, Appendix, page 140, are, in fact, authorities for this position. Such lien could only be enforced against the property subject thereto so long as it remained the property of Mirza Mahomed, and so long as the decree remained in force by attachment under that decree, though according to the decisions; and it would seem as a necessary consequence of section 246, Act VIII. of 1859, if the property before attachment had passed into the hands of third persons, a separate suit would have been requisite to enforce the lien against the land in the hands of such third persons. It has been urged that, because the property was situate in the district of Maldah, the Moorshedabad Court have no power to affect it by its decree; but the effect of the decree in the Moorshedabad Court was not to create any right against the land, but to turn a contract-debt, to which a lien was incident, into a judgment-debt, to which, without any operation of the Moorshedabad Court, any already-existing lien would attach

by reason of it representing the original contract-debt.

Moreover, in the case before us, at the date of the sale to Meer Hossein, the property over which the lien extended had already, in fact, been attached by the Mohunt under the decree of the 14th April 1864. It seems to me clear that an attachment under a money-decree on a mortgage-bond and the mortgage-lien cannot co-exist separately in the property hypothecated, and that such an attachment must be treated when existing as an attachment enforcing the lien.

This attachment existing at the date of Meer Hossein's purchase passed as an incident of the decree purchased by him; and as the property was sold on the 29th April 1865, pending such attachment, the lien was transferred from the property to the purchase-money; and thereupon the property became thenceforth discharged from the lien.

Meer Hossein might, after the rejection by the Sudder Ameen of his application with respect to these purchase-moneys, have instituted a regular suit to establish his title to them under section 270; but failing to do so, he forfeited his lien both in the land and the purchase-moneys.

But, having forfeited such lien, it does not follow that he forfeited the right to execute otherwise the decree of the 14th April 1864. The only result was that such decree became thenceforth a mere money-decree, discharged from any incidental lien.

It becomes necessary, therefore, to decide the first issue tried by the Subordinate Judge, *viz.*—Is execution of that decree barred under section 20 of Act XIV. of 1859.

That section enacts that process of execution shall not issue unless some proceeding shall have been taken to enforce or keep in force a decree within three years next preceding the application for execution.

It has been strenuously argued before us that the proceeding intended by that section must be a proceeding by some person legally and rightfully entitled to the decree; and consequently that neither the attempts by Meer Hossein in 1865 to obtain the sale-moneys (the decree at that time not having been legally transferred to him), nor the attempt by Moneerun in 1868 to execute the decree (she being a nominee of Meer Hossein for the purpose of defrauding his creditors, and her name not having been substituted for that of Meer Hossein as decree-holder) could operate to keep the decree alive.

I cannot find any warrant in section 20 for such argument. That section appears to me not to require more than that some actual proceeding should be taken, which, if successful, would result in the discharge or partial discharge of the judgment-debt. With respect to the proceeding of 1865 by Meer Hossein, if he had succeeded in retaining under attachment, as he was *bonâ fide* attempting to do, the purchase-moneys arising under Poran's execution, the decree which he had then contracted to purchase, and the transfer of which he was then enforcing by suit in which he afterwards succeeded, might have been satisfied therewith.

I see no ground whatever for holding that the applications made by Meer Hossein in 1865 were not proceedings to enforce the decree.

And with respect to Moneerun's proceedings in 1868, the appellant admits in his written statement that, on the 2nd of April 1868, she applied for execution, and that notices were issued under section 216. Had such proceeding resulted in a realization of money, it cannot be said as between the judgment-debtor and Meer Hossein, or those claiming under Meer Hossein, that the receipt by Moneerun of such money would not have gone in discharge of the decree. Moneerun might only have been entitled to hold the money in trust for Meer Hossein or for his creditors; but that circumstance would not have effected the discharge of the decree, in execution of which such money were realized. The fraud of Meer Hossein in attempting to withdraw the decree from the claims of his creditors did not concern the judgment-debtor. As against him, the execution-proceedings were very real proceedings to realize the judgment-debt, and of which, had they been successful, the creditors of Meer Hossein might have availed themselves; and such proceedings were not set aside until after the purchase by the respondent, and only as fraudulent against her. With respect to Moneerun's name not having been substituted for that of Meer Hossein as decree-holder, it does not appear that the assignee need do more than apply for execution under section 208, Act VIII. of 1859; and it does appear from the appellant's written statement, and from his petition dated the 21st July 1868, that in fact Bibee Moneerun had executed the decree from which execution the appellant, by his petition, prayed to be released.

I am therefore of opinion that the Subordinate Judge was right in holding that execution under the decree of the 14th of April 1864 was not barred. And, as a matter of

t, that decree has been executed by the pondent in the Moorshedabad Court ainst the heirs of Mirza Mahomed as an ising decree. But inasmuch as I dis- t from the conclusion of the Subordi- e Judge with respect to the continuing stence of the mortgage-lien, being of opi- n that such lien was upon the sale in exe- ion under Poran's decree transferred from land to the purchase-moneys, it becomes cessary to inquire whether the property, ich the respondent now seeks to sell, is st-property; or whether purchase in the me of Khorshed Begum under Poran's exe- ion was in fact a purchase with the ney of Mirza Mahomed, and the property rchased consequently liable for Mirza homed's debts.

Having regard to the appellant's defence up in the 2nd and 10th paragraphs of his ten statement, I think that the fifth of the es settled by the Subordinate Judge was icient to raise the question as to whether not the property was trust-property.

This question the Subordinate Judge has y incidentally treated in his judgment, as as not necessary for him to decide it, if, he held, the mortgage-lien still existed. me evidence on the issue was adduced by appellant, and appears in the record; and Judge has clearly shown the inclination his opinion that the purchase was ficti- s, adducing as a reason for such opinion fact that the property had been purchased the name of a near relation of Mirza homed, and not in the name of Nadir sein, the then acting trustee.

In addition to this reason, Counsel for the pondent has relied on three circumstances invalidate the purchase: *first*, because trusts of the deed of the 1st of Bysack 6 are not wuqf, and therefore that the d is invalid as against the heirs of Khar- nissa; *secondly*, that the allegation that the perty was purchased out of the profits of aroonnissa's trust-property is obviously rue, because in the deed of the 23rd of gust 1864, under which Mirza Mahomed ointed the appellant as a trustee for three rs, it is recited that the profits were inade- ite to defray the expenses; and the sche- le to such deed shows that the income of 3,296 was fully absorbed in payment the claims and expenses specified in such edule; and, *thirdly*, because the property tinued after the sale under Poran's decree to egistered in the name of Mirza Mahomed.

I think the first of the above grounds enable, because whether the trusts were or were not strictly wuqf, they were trusts that had been established, acted upon, and acquiesced in, for some years anterior to the decree of the 14th of April 1864, at which date all heritable rights (if any) of Mirza Mahomed in the property subject to the deed antagonistic to the trusts thereof, so far as such trusts affected the property, must be considered to have ceased.

With regard to the third objection, there is nothing in the record to show that, after the sale under Poran's execution, the property continued to be registered in the name of Mirza Mahomed, but, even if the allegation were correct, it would not, under any circumstances, be conclusive, and in this particular case, if the property was bought with funds of which Mirza Mahomed was trustee, the fact that the property continued registered in his name would be immaterial.

With respect to the second objection, it is no doubt very suspicious that the property was purchased under Poran's execution for Rs. 14,000 on the 29th of April 1865, within less than a year after the recital, stating that the trust-income was insufficient to defray current expenses; on the other hand, it should be noticed that in Kharoonnissa's will the profits had been estimated at Rs. 3,636, and that, by the death of Mirza Enayet Ali Beg, one of the objects of the trust, Rs. 1,200 per annum, a personal allowance to him, had been set free; and three witnesses were examined on behalf of the appellant, one of whom deposed that Mirza Mahomed purchased the 15½-annas share of Pultapore in the name of Khorshed Begum from the funds of Kharoonnissa, but stated that his knowledge was founded only on communication by Mirza Mahomed himself; and another witness stated that the purchase was made by means partly of the trust-funds and partly of a subscription made for the purpose of the purchase.

Counsel for the appellant has urged that the respondent has not adduced a scintilla of evidence to show that the purchase-money moved from Mirza Mahomed himself; and he very strongly pressed upon our attention the case of Sreeman Chunder Dey,* 11 Moore's Indian Appeals, page 28.

That case is no doubt, in many respects, a stronger case than the present, and it is there broadly laid down that in cases of this nature although there may be circumstances of very strong suspicion, and though the person insisting on the validity of the purchase may

* Sreeman Chunder Dey *vs.* Gopaul Chunder Chuckerbutty, 7 W. R., P. C., 10.

even have given a false account of the sources from which the purchase-moneys were derived, still the affirmation lies upon the party impeaching the sale, and the Court must not act upon suspicion, but must require actual proof that the purchase-moneys are the moneys of the judgment-debtor. Of course, we must follow the rulings in that case, unless the circumstances of the present case materially differ therefrom. There were two circumstances in that case which were relied on by the Privy Council (page 48) as very material which do not exist in the present case.

This suit is not "the fruit of angry feeling;" and although the plaintiff in this, as in that case, is only a transferree of the judgment-debt, yet in the present case the property was attempted to be attached by the plaintiff's predecessor through Moneerun prior to the transfer to the plaintiff.

Under these circumstances, it seems to me very material in the present case to consider what explanation the respondent gives of the manner in which the purchase-moneys were supplied on the purchase in 1865 under Poran's execution, and such explanation deliberately made and supported by evidence must, I think, be taken as an admission binding upon him.

His statement is that the property was purchased in 1865 out of the surplus profits of Kharoonnissa's trust-settlement, and he seems to have assumed that the conclusion of law must be that the property so purchased is trust-property.

This assumption, however, altogether ignores the fact that the property affected by Kharoonnissa's will was thereby dedicated to trust purposes only so far as the trusts thereby declared might require; and that under such will Mirza Mahomed would, at the date of the purchase, have been entitled to retain for his own benefit all surplus profits not required for the execution of the trusts, inasmuch as, subject to such execution, he was expressly made by that will irresponsible and unaccountable.

If then this property was purchased out of surplus income not required for the purposes of the trust, it was purchased with funds which at the time Mirza Mahomed might have applied to his own purposes without being able to account for the same to any one; so that such purchase would, in fact, have enured for his own benefit, for if the purchase was made out of profits, it follows that before the purchase the trust-property was already more than sufficient for the purposes of the trust. No evidence beyond a mere recital in Mirza Mahomed's will has been adduced to show that, during Mirza Mahomed's life-time, the property purchased in the name of Khorshed Begum, by funds applicable to his own purposes, were dedicated by him to trust-purposes, which would prevent a judgment-creditor executing his decree against the property so purchased.

In the absence of such evidence, and on the admission of the appellant that the property was purchased out of surplus profits not applicable to trust purposes, and as the execution of the respondent's decree is not barred by limitation, I think that the respondent is entitled to execute her decree against the 15½-annas share of Pergunnah Pultapore, and I am therefore of opinion that this appeal should be dismissed with costs.

Kemp, J.—I concur in this judgment.

The 10th March 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Suit for Kubooleut—Rent—Landlord and Tenant.

Cases Nos. 580 and 581 of 1872.

Special Appeals from a decision passed by the Officiating Judge of Hooghly, dated the 17th January 1872, affirming a decision of the Moonsiff of Hurripal, dated the 9th September 1871.

Sowdaminee Debia (Plaintiff), *Appellant,*

versus

Mohesh Chunder Mookerjee (one of the Defendants), *Respondent.*

Baboos Hem Chunder Banerjee and *Baboo Churn Banerjee* for Appellant.

Baboo Becharam Mookerjee for Respondent.

In a suit for a *kubooleut* for certain resumed *lakheraj* where it was found that the quantity of land in defendant's possession was less than that alleged by the plaintiff, and that the rates of rent deposed to were less than those claimed:

HELD, that the suit was rightly dismissed, and that the mere use of the word "probable" in describing the rate of rent claimed ought not, under the circumstances, to better the position of the plaintiff; the entire gist of the suit having been to get a certain rate of rent:

HELD (by Mitter, J.) that the mere fact of the land in question having been declared in a previous litigation between the parties to be the *mál* lands of the plaintiff's zemindary wrongfully held by the defendant under an invalid *lakheraj* title was not sufficient to convert the defendant into a tenant of the plaintiff; and that, as the relation of landlord and tenant did not exist between the parties, the foundation was wanting for a suit for *kubooleut.*

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Glover, J.—I THINK that these appeals t be governed by the Full Bench decision Gholam Mahomed *versus* Asmut Alie m, 10 Weekly Reporter 14.

he suit was for a *kubooleut* for certain med *lakheraj* lands at the rent of 79-12, and both Courts below found the quantity of land in the defendant's ession was less than that alleged by the ntiff, and that the rates of rent as deposed by the witnesses were less than those med; they, therefore, on the authority he decision above quoted, dismissed the ntiff's suit.

is urged in appeal that the two cases not similar, and that the plaintiff, who claimed a rate of rent which would ably be found to be the correct rent, is in the position of a landlord claiming a d rate of rent certain, and ought to have awarded a *kubooleut* at such rates as ht be found just and proper.

t the plaintiff did, in my opinion, subtially claim a certain rate of rent. He certainly use a word which may be lated "probable," but the entire gist of suit is to get a certain rate which he fixes he rate, which other ryots similarly cirstanced were in the habit of paying, and mere use of the word "probable" ought under the circumstances, to better his tion. As landlord with his jummabundee and to consult, he could have had no ible difficulty in making an exact esti-, and I have no doubt that he meant the claimed to be that estimate.

he case of Gopeenath Jenna *versus* oo Mullah and others, 18 Weekly orter 272, is not in point. In that case defendant had had notice of the zemins claim, and knew perfectly well the case ad to meet, and, as a matter of fact, did best to meet it. In this case no notice served.

do not think that we can say that the ge was wrong in law in deciding as he and as the question whether, under the umstances of this case, a suit for a *kuboo-* would lie at all (and concerning which e have been conflicting decisions of this rt) was not raised before him, there ears to be no necessity for our consider-it in this appeal.

would dismiss these appeals with costs.

Litter, J.—I concur with my learned ague in dismissing these two special eals with costs.

he mere fact that the lands in question e declared, in a previous litigation between the parties, to be the *mál* lands of the plaintiff's zemindaree, wrongfully held by the defendant under an invalid *lakheraj* title, created subsequent to the 1st of December 1790, is not, in my opinion, sufficient to convert the defendant into a tenant of the plaintiff in respect of those lands. In the case of an invalid *lakheraj* grant for less than one hundred beeghas made before the date above referred to, the relationship of landlord and tenant does not, and cannot, come into existence between the *lakherajdar* and the zemindar, until the former has agreed to accept the assessment made by the Collector under the provisions of the 9th section of Regulation XIX. of 1793; and I do not see any reason whatever why a different principle should be adopted in cases falling within the 10th section of that Regulation. It may be conceded that, under the latter section, the zemindar is entitled, nay required, to annex the lands to his zemindaree, and to collect the rents thereof; but, so long as the *lakherajdar* does not choose to accept the terms offered to him, all that the zemindar can do is to sue him for ejectment, or for use and occupation, or for both. The decrees relied upon by the plaintiff merely declared that the lands in dispute are the *mál* lands of his estate, and that the defendant had taken wrongful possession thereof under color of a *lakheraj* title. How such a declaration can be construed to have the effect of converting a trespasser, pure and simple, like the defendant, into a tenant of the plaintiff, I am utterly at a loss to understand; nor am I aware of any principle or rule of law on the strength of which it can be held that a person who holds wrongful possession of another's land, and who has never agreed in any manner whatever to accept the position of a tenant, is liable to be treated as such against his will and consent. I am fully prepared to admit that the relationship of landlord and tenant can be created by express statutory provision, as well as by contract based upon mutual consent. But I find nothing whatever, either in the 10th section of Regulation XIX. of 1793, or in the decrees relied upon by the plaintiff, which goes to establish such a relationship between him and the defendant, and in the absence of any mutual agreement, express or implied, between the parties, I feel myself bound to hold that the defendant cannot be treated, against his will, as a tenant of the plaintiff in respect of the lands to which this litigation relates.

If the preceding observations be correct,

as far as they go, the present suits which are brought for *knbooleuts* must fail as a matter of course. It has been repeatedly held that the very foundation of a suit for *kubooleut* is the existence of the relationship of landlord and tenant, and as that foundation is wanting in both the suits now before us, we are bound to dismiss them both with costs.

The 13th March 1873.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Hindu Law — Testamentary Devise — Stridhun—Succession—Mother—Husband.

Case No. 1198 of 1870.

Special Appeal from a decision passed by the First Subordinate Judge of the 24-Pergunnahs, dated the 28th March 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 1st September 1869.

Judoo Nath Sircar (Plaintiff), *Appellant,*

versus

Bussunt Coomar Roy Chowdhry (Defendant), *Respondent.*

Baboos Gopal Lall Mitter and *Grish Chunder Ghose* for Appellant.

Mr. J. T. Woodroffe and *Baboos Rajendro Nath Bose* and *Oopendro Chunder Bose* for Respondent.

Property coming from a father to a daughter before her marriage, under a testamentary devise, falls within that category of *stridhun* which is described in the Hindu Shastras as property given to a woman by her father before her marriage.

On her death, the mother, and not the husband, is the preferential heir to such property.

Mitter, J.—THE property which forms the subject-matter of this litigation originally belonged to one Huree Narain Mitter, who gave it by will to his daughter Prosunno Moyee. Soon after the death of her father, Prosunno Moyee married Janokee Nath Sircar, the plaintiff in this case, and died shortly after, leaving her husband and her mother surviving her. In this state of facts, the question we have to determine is whether the mother or the husband is entitled to inherit the property above described.

Before proceeding, however, to determine this question, we think it necessary to make a few preliminary observations on the legal character of the property in dispute. It has been argued on behalf of the respondent that this property cannot be treated as the *stridhun* of Prosunno Moyee, inasmuch as it was acquired by her, not under an ordinary gift, but under a testamentary devise,—a mode of disposing of property not recognized by the ancient law of the Hindus. We are of opinion, however, that this objection is not valid. Whatever might have been the ancient Hindu law on the subject it seems to have been settled by a uniform course of decisions of unimpeachable authority that testamentary dispositions are not opposed to the spirit of that law, and we may add that, in the recent case of Tagore *versus* Tagore, it had been expressly held by the Privy Council that such dispositions are to be treated as a species of gift: "As to gifts "by way of will," their Lordships observed page 366, Weekly Reporter, Volume XVIII., "whatever doubts may have once "been entertained by learned persons as to "the existence of the testamentary power "those doubts have been dispelled by "course of practice in itself enough, "necessary, to establish an approved usage "and by a series of judicial decisions both "here and in India, proceeding upon the "assumption that gifts by wills are legal "binding and recognizing that form of gift "as part and parcel of the general law. "The introduction of gift by will into general use has followed in India as in other "countries the conveyance of property *inter* "*vivos*. Such a disposition of property "take effect upon the death of the donor "though revocable during his lifetime, "until revocation, *a continuous act of gift* "up to the moment of death, and does then "operate to give the property disposed of "the persons designated as beneficiaries. "They take upon the death of the testator "as they would if the property had been "given to them during his life-time, &c., &c. "The law of wills has, however, grown up, "to speak, naturally from a law which "furnishes no analogy but that of gifts, and "it is the duty of a tribunal dealing with a "case new in the instance to be governed by "the established principles and the analogies "which have prevailed in like cases." The above observations are, we think, sufficient to justify us in holding that the property in dispute falls within that category of *stridhun* which is described in the Hindu Shastras as property given to a woman by her father before her marriage; and

ccordingly overrule the preliminary objec-
n of the special respondent.

With reference to the main question itself, e are of opinion that the mother, and not e husband, is the preferential heir.

It is admitted on both sides that the case fore us is governed by the Hindu law cur-nt in the Bengal School, and as the Daya-aga is the highest of all the authorities re-gnized in that school, it is to the Daya-aga that we will first direct our attention.

Now, clause 29, section 3, Chapter IV. of t treatise (Colebrooke's translation, page), appears to us to be conclusive on the int. That clause is as follows:—

"Therefore, the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; but, n failure of all these, it devolves on the usband. Thus Catyayana says: 'That which has been given to her by her kindred goes on failure of kindred to her husband.'"

It has been argued that the passage above oted refers to that kind of *stridhun* only ich is called *sulka* (fee or perquisite). t this argument is evidently founded on a stake. The very text of Catyayana cited the author in the passage in question ows that it also refers to property given to woman by her kindred, that is to say, by r father and mother; and if this is not ficient to remove all doubts on the point, have only to examine a few of the preced-g clauses.

In clause 10 of the same section and chap- the author introduces the subject by ing that "Property received by a woman er her marriage from the family of her ther, of her mother, or of her husband, es to her brothers (not to her husband)," d in support of this position he cites a text Yajnavalkya, which declares: "That ich has been given to her by her kindred, well as her fee or gratuity (*sulka*), and ything bestowed after marriage, her kinsmen e, if she die without issue." It should be rne in mind that this text of Yajnavalkya fers to three different kinds of *stridhuns*, mely, *1st*, property given to a woman by r kindred; *2nd*, her (*sulka*) fee or gratuity; d, *3rd*, property bestowed on her after her rriage.

In the next clause (clause 11) the author es up the first of these three kinds of idhun, and says that property "given by r kindred" means property given by her her or mother. He then adds that brothers e signified by the word "*kinsmen*."

In clause 12 he cites a text of Vriddha Catyayana declaring that "immoveable property given to a woman by her parents goes always to her brothers, if she die without issue," and adds that "the brothers' right of succession is *founded on her leaving no issue*."

In clause 13 he says that, according to the opinion of Viswarupa, the brother is entitled to inherit such property without any reference whatever to the particular form of marriage, and adds that this opinion ought to be respected.

In clause 14 he says that the above rule is *à fortiori* applicable to every other kind of property.

In clause 15 he says that the phrase "given by her kindred" signifies that which was given to her by her parents *during her maiden state*.

In clauses 16, 17, and 18 he defines "a gift subsequent," which is the third kind of *stridhun* mentioned in the text of Yajnavalkya above referred to.

In clause 19 he takes up the second kind of *stridhun* mentioned in that text, namely, *sulka* property.

In clauses 20 and 21 he explains what *sulka* means.

In clauses 22, 23, 24, 25, 26, and 27 he discusses the opinions of several authors about the order of succession to be followed in regard to such property, and in verse 28 he concludes the discussion by saying that "in the first it goes to brothers of the whole blood, then to the mother, and, on her default, to the father."

It is clear, therefore, that the proposition laid down in clause 29 is nothing but the final *résumé* of the various matters discussed in the preceding clauses, commencing from clause 10; and its applicability to all the three kinds of *stridhun* mentioned in the text of Yajnavalkya referred to in the last-mentioned clause is consequently beyond all dispute. It would be absurd to contend that the author of the Dayabhaga has laid down, in the case of property given by a woman's kindred, a rule of succession different from that laid down by him in the case of *sulka* property, when it is beyond all question that both those kinds of property are governed by the same text of Yajnavalkya which is cited by him at the very threshold of the discussion.

The next authority to which we wish to refer is the Dayatutwa of Rughoonundana. In page 43 of the printed copy the author says: "In default of barren and widowed "daughters, the husband succeeds, but this

"does not relate to property given by parents, "since in that case the brother succeeds;" and this passage clearly shows that the author of the Dayatutwa is of the same opinion as the author of the Dayabhaga.

It has been said that the mother is not expressly mentioned in the passage above referred to. But this argument does not appear to us to be of any force whatever. The object of the author of the Dayatutwa was merely to indicate the line of succession, and not to enumerate all the heirs one after the other; and as the right of the mother and father to come in immediately after the brother did not admit of any dispute or doubt, it was sufficient for his purpose to say that the brother, and not the husband, is not entitled to succeed to property given to a woman by her parents. There is nothing in the Dayatutwa, or in any other work on Hindu law that we are aware of, on the strength of which it can be contended that the husband is entitled to come in between the brother and the mother.

The author of the Vivada Bhunganaba also appears to be of the same opinion, as may be seen from the following text of Catyayana quoted by him in page 317 of the 4th volume of Colebrooke's Digest:—

"On failure of her parents and brothers, what she received from her kinsmen as a gift descends to her husband."

Much stress has been laid by the pleader for the appellant on paragraph 3, section 5, Chapter II. of the Dayakrama Sungraha of Sreekissen Turkolunkar. That paragraph is as follows:—

"Next the succession devolves on the barren and widowed daughters, and, in default of all daughters, the *son and the rest* succeed as in the case of property received at nuptials;" for a text of Menu declares: "The wealth of a woman which has been in any manner given to her by her father and mother, let the Brahmani damsel take, or let it belong to her offspring."

It has been argued that, in the case of property received at nuptials celebrated in the Brahma form, the husband is entitled to come in immediately after the great-grandson of the co-wife in preference to the brother, mother, and father, and as the marriage of the lady, to whose property this dispute relates, was admittedly celebrated in the Brahma form, the plaintiff, as her husband, and not her mother, is the preferential heir under the authority of the paragraph quoted above. This contention, however, does not appear to us to be sound. No doubt, if the paragraph in question had stood alone, there might have been considerable force in the argument that the word "rest" in the phrase "*the son and the rest*" includes not only all the heirs down to the great-grandson of the co-wife, but also the husband, the brother, the mother, and the father, who are entitled to come in after such great-grandson. But such a construction would be directly contrary to the provisions of the 15th and 16th paragraphs of the 3rd section of the same chapter, in which it is distinctly laid down that, in the case of property given to a woman by her father and mother, the brother is entitled to succeed (without any reference whatever to the form of marriage), *if she die without issue.* Those two paragraphs, as translated by Mr. Wynch, stand as follow:—

Para. 15.—"On failure of her husband, her brother is the next successor according to the text of Yajnavalkya. 'That which was given to her by her kindred, as well as her fee or gratuity and anything bestowed after marriage, her kinsmen take, if she die without issue.'"

Para. 16.—"The term *kindred* means her father and mother, and consequently by the term kinsmen her brothers are signified. The same is declared by Catyayana, who says: 'Immoveable property which has been given by parents to their daughters *goes always to her brother if she die without issue.*' Here, since the terms immoveable property are used, other property is, of course, intended by the argument drawn from the lota and staff. *Thus it is stated in the Dayabhaga.* By the use of the term *always*, it appears that the eight forms of marriage, namely, Brahma and the rest, are included."

It should be borne in mind that the original work is not divided into chapters, sections, and paragraphs, and that there are two errors of printing in paragraph 15 as quoted above.

In the first place, there should be a full stop after the word "*successor;*" and, in the next place, the words "according to the text of Yajnavalkya" ought to be read as commencing a new sentence, having no connection whatever with the first portion of that paragraph (down to the word *successor*), which relates to property received by a woman at her nuptials.

These two paragraphs, therefore, clearly show that there is no conflict between the Dayakrama Sungraha and the Dayabhaga in regard to the brother's right to succeed to property given to a woman by her parents *if she die without issue.* On the contrary

the author of the Dayakrama Sungraha expressly adopts the view taken by the author of the Dayabhaga, as may be seen from the words: "Thus it is stated in the Dayabhaga" in paragraph 16. How then are we to reconcile these two paragraphs with paragraph 3, section 5, Chapter III. It cannot be said that the author of the Dayakrama Sungraha has been guilty of laying down two contradictory rules in two different parts of the same work, and the only way of escaping from this difficulty is to hold, as we think we are bound to do, that the word "*rest*" in paragraph 3, section 5, Chapter II., includes all the heirs down to the great-grandson of the co-wife, but not those who are entitled to come in after such grandson.

For the above reasons, we dismiss the special appeal, and affirm the judgment of the Lower Appellate Court, with costs.

The 18th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Irrelevant Issues—Remands.

Case No. 766 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 25th February 1872, reversing a decision of the Moonsiff of Kotulpore, dated the 22nd May 1871.

Ram Soondur Banerjee and another (two of the Defendants), *Appellants,*

versus

Kalee Pershad Hajrah (Plaintiff), *Respondent.*

Baboo Rash Beharee Ghose for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

In a suit by a talookdar where the dispute was whether certain land which plaintiff held was what he was entitled to hold as lakheraj, under a sunnud which he produced, and as to the genuineness of which no question was raised, the Lower Appellate Court indicated that it considered the sunnud not to be genuine:

HELD, that this was an important error, as the genuineness of the sunnud was in no way in issue, and that the judgment must be set aside, and the case remanded.

Markby, J.—IT seems to us that this judgment of the District Judge cannot be supported. The dispute was between the plaintiff and the defendant as to whether or no certain land which the defendant held was the land which he was entitled to hold as *lakheraj*, the plaintiff being the talookdar of the property. The plaintiff in his plaint refers to a *sunnud*, and says that the land which the defendant holds as *lakheraj* is situated elsewhere. The defendant was bound to produce his *sunnud* in the Moonsiff's Court, and the contest there was whether the land covered by the *sunnud* was the land which the defendant holds, or whether, as the plaintiff stated, it was situated elsewhere. That assumes the genuineness of the document which was produced by the defendant, and no question was raised in the grounds of appeal to the Lower Appellate Court as to that part of the case. Then the Lower Appellate Court apparently, without indicating in any way that such a question was to be gone into before him, makes certain observations upon the *sunnud* which we can only understand to mean that he considered that the *sunnud* was not a genuine document. That does not seem to have been in any way at issue between the parties. What the Judge ought to have done was, taking the *sunnud* as a genuine document, to see if the defendant's case which was made out to the satisfaction of the Moonsiff could be displaced. We cannot consider a judgment which contains such an important error as this to be a satisfactory judgment.

We are, therefore, compelled to set aside the judgment of the Judge, and send back the appeal to be re-heard by him.

Costs of remand will abide the ultimate result.

The 20th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Imperfect Decree—Fresh Trial.

Case No. 272 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 7th September 1871, reversing a decision of the Subordinate Judge of that District, dated the 4th July 1871.

Kishen Dyal Lall (one of the Defendants), *Appellant,*

versus

Moulvie Abdool Luteef (Plaintiff) and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry, *Sreenath Doss*, and *Boodh Sen Singh* for Appellant.

Baboo Unnoda Pershad Banerjee and *Moonshee Mahomed Yusuf* for Respondents.

The High Court ordered a fresh trial in a case where the decree was imperfect, and one could not be drawn up from the judgment, and the Judge who gave the judgment was no longer Judge of the district, each party bearing his own costs in appeal.

Phear, J.—THE decree which has been made in the Court below has unfortunately been put into a most imperfect shape. It is quite clear that we cannot, in justice to the parties, allow it to stand. It also appears that the Judge who gave the judgment in this case is no longer the Judge of the district at this time; and as it is quite impossible to draw up a decree merely from a perusal of the judgment which was given, it seems that there is no alternative but to order a fresh trial in the Court below.

Under ordinary circumstances, when it becomes necessary to do so, it is usual for the Court to make the costs of this abortive appeal costs in the cause; but we think that the right order to make under the very peculiar circumstances of this case is that each party should bear his own costs of this appeal.

The 20th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Mahomedan Law—Suit for Dower—Declaratory Decree—Right of Action.

Case No. 55 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 19th December 1871.

Musst. Zaibunnissa (Defendant), *Appellant*,

versus

Musst. Ilahee Begum (Plaintiff), *Respondent.*

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Appellant.

Mr. Kennedy and *Baboo Boodh Sen Singh* for Respondent.

In a suit by I, the widow of one F, to recover from his sister Z, who was his heir-at-law, the amount of a deferred dower, it was found that no portion of the estate of F had come into the hands of the defendant:

HELD, that no decree for the amount claimed could be made against the defendant; neither could a decree be made in favor of the plaintiff as against property not in the hands or under the control of the other party:

HELD that, whether the property was in the hands of the plaintiff herself or of a third party, a suit for a declaration of right would be premature. In the former case, she must wait till the defendant seeks to get it from her; in the latter she must show that defendant had endeavoured to approach it, or that she (plaintiff) was prejudiced in making out the best case against the third party.

A Court ought not to make a declaration of right in favor of a party on a state of facts which are not sufficient to enable it to grant substantial relief.

Phear, J.—IN this suit Mussamut Ilahee Begum, widow of one Syud Fazeelut Hossein, sued Mussamut zaibunnissa, sister of her deceased husband, to recover the amount of Rs. 42,788 odd annas as the amount of deferred dower due to her. She alleged that, on the occasion of her marriage, a deferred dower of Rs. 40,001 of the *Kuldar* coin and one goldmohur was agreed to by her husband; that he died on the 22nd April 1868 without paying that dower; that the defendant is the heir-at-law of the deceased; that, notwithstanding repeated demands, she does not mind paying the dower; and on these grounds the plaintiff brings the suit, praying that the amount claimed with interest from the date of the suit may be awarded.

The Subordinate Judge has found as a fact on the evidence before him that the plaintiff was entitled to deferred dower of the amount which she claimed out of her husband's estate. But he also found as a fact that none of the deceased's estate had come to the hands of the defendant. Nevertheless, on this finding, he gave a decree in favor of the plaintiff in these terms: "The plaintiff shall recover the amount claimed with costs and interest at 8 annas per cent per mensem on the principal sum decreed from the date of action to this date, and of the aggregate of principal, interest, and costs from this date until the realization thereof from the estate of Fazeelut Hossein deceased. The defendant shall defray his own expenses."

We think it clear that this decree cannot stand upon the ground furnished by the findings of fact come to by the lower Court; and at the same time we see no reason upon the evidence to alter those findings. It appears to us that the Judge rightly found upon the evidence that the dower to the extent of Rs. 40,001 and one goldmohur was granted

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to the plaintiff by her husband on the occasion of marriage, and that it was not paid at the time of the decease of the husband. It also appears to us that the Subordinate Judge was quite correct in his finding upon the evidence that no portion of the estate of Fazeelut Hossein had been proved to have come into the hands of the defendant. This being so, it is quite clear that no decree for the recovery of the amount as prayed for in the suit could be made against the defendant; and the Subordinate Judge does not make it. Neither could a decree be given in favor of the plaintiff as against property which was not in the hands or under the control of the other party to the suit.

We have been asked during the discussion of this appeal to convert the decree of the lower Court into a declaration of right on the part of the plaintiff as against the defendant. The first great objection to this is that the plaintiff never asked for relief of this kind. And we are also very strongly of opinion that a Civil Court ought not to make a declaration of right in favor of a party on the state of facts which are not sufficient to enable it to grant substantial relief, supposing that the Court thought fit to do so. And we think that this view accords with some of the decisions which have been lately passed by the Privy Council. But the plaint does not put forward any ground upon which a declaration of right in this view could be made at all. It is remarkable that the plaint does not even put forward any ground upon which the decree sought for in the prayer of the plaint against the defendant could be made. It merely asserts that the defendant is the heir-at-law of the deceased, and abstains altogether from asserting that she had received assets belonging to the deceased. However, in the absence of any allegation of that kind, an issue was no doubt raised as if the allegation was there. Still, when we have to consider whether a declaration of right could be supported, we must, we think, look to the plaint to see whether there is sufficient in it to justify a prayer for relief on the foundation of that right, and as we have already said there is none. It was said by the learned Counsel during the argument that the defendant is, in fact, setting up a claim to the deceased's property as free of dower; and inasmuch as the Court has found that the plaintiff is entitled to dower, this behaviour on the part of the defendant would justify the Court in giving the plaintiff a declaration of right. But the Court has, at the same time, found that none of the deceased's property has come into the hands of the defendant. Therefore, that property must either be in the hands of the plaintiff herself, as the defendant in her written statement says it is, or in the hands of a third party. In either case it seems to us that a suit, even for a declaration of right alone, is premature. If the plaintiff has her deceased husband's property in her own hands, she must wait until the defendant seeks to get it from her before a declaration of this kind even can be made. It does not follow, as indeed we were told in the course of the argument by the defendant's Counsel, from any thing that has yet occurred that the defendant will seek to get this property out of the hands of the plaintiff without, at the same time, asking for a proper account. If the property is in the hands of third persons, it is not shown us that the defendant has, in any way, endeavoured to approach it; and the plaintiff is not prejudiced as yet in making out the best case that she can against those third persons, and realizing directly from the property in the hands of those persons that claim which she now wants to get indirectly asserted against the defendant who has none of the property at all.

Under these circumstances, while we think that the decree passed by the lower Court certainly cannot be supported by the findings of fact at which the Court arrived, we also think that the plaint and the evidence fail to supply any sufficient ground upon which we could give the plaintiff any other relief. We think, therefore, that the decree of the Court below should be reversed, and the suit dismissed with costs.

The 24th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Limitation—Cause of Action.

Application for admission of a Regular Appeal from a decision passed by the Officiating Judge of Gya, dated the 28th June 1872.

Reaz Ali Khan, *Pauper* (Plaintiff), *Petitioner*,

versus

The Government of India (Defendant), *Opposite Party.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusuf* for Petitioner.

No one for Opposite Party.

Ignorance of the cause of action having accrued when owing to any other cause than the fraud of the defendant, *e. g.*, absence from the country, does not give plaintiff a longer time for suing.

Phear, J.—It appears to us very plain upon the materials disclosed by the plaint that the Judge was right in holding the suit barred. The plaintiff complains that the Government, in 1857, while he was absent from the country, seized and sold his property upon the allegation that he was a rebel, and that his property had become forfeited by law to the Government. He says that he remained away on pilgrimage from that time until 1864; when he came back to this country he gave himself up and was tried on the charge of having taken part in the mutiny, and was acquitted. He says that his cause of action accrued at that date, because, while he was away, he was in entire ignorance of what the Government had done, and he was not in a position to assert his right until his innocence had been declared by a competent Court.

It seems to us that there is no consideration arising out of these facts which goes to alter the date of the cause of action; that cause of action was nothing more or less than the wrongful conduct of the Government, as the plaintiff characterizes it, in seizing and selling his land in 1857. It has been held over and over again that ignorance of the causes of action having accrued does not give the plaintiff a longer time for suing, unless that ignorance has been produced by the fraud of the defendant. According to the plaintiff's own account, his ignorance was in no way caused by the misconduct on the part of the Government; it was the simple consequence of his being away from this country. It seems to us quite clear that his cause of action is barred, and that the judgment of the lower Court is right upon this point. And therefore we ought not to allow the petitioner to appeal to this Court *in formâ pauperis*. We consequently reject this application.

Of course this decision does not prevent the petitioner from bringing his appeal in regular course, if he is able to do so.

The 24th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Fraudulent Transfers.

Case No. 517 of 1872.

Special Appeal from a decision passed by the Judge of Sarun, dated the 29th December 1871, affirming a decision of the Subordinate Judge of that District, dated the 28th December 1870.

Gopal Narain *alias* Jugdeo Narain (one of the Defendants), *Appellant,*

versus

Gunga Pershad Sahee (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* and *Moonshee Mahomed Yusuf* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

A party succeeding to the possession of the property not entitled to ask the assistance of the Court either rectify deeds of transfer fraudulently effected by his predecessor, or to ask that these documents should be treated as void at law.

Phear, J.—In this suit the plaintiff seeks to obtain a declaration of right to certain property as against the defendant. He says that the property originally belonged to Ram Pershad Sahoy, deceased, his brother; that upon the death of Ram Pershad Sahoy, it went to his widow Mussamut Luchmee Kooer; that Mussamut Luchmee Kooer died in 1271, and that since that time he, the plaintiff, has been in possession of it. The plaintiff further goes on to say that the defendant has obtained a certificate under Act XXVII. of 1860, entitling him to collect the debts of Mussamut Luchmee Kooer, and that so fortified, he is about to take possession of a sum of Rs. 100, which appears to be standing in the name or rather to the credit of Luchmee Kooer in the books of the Collectorate.

The principal objection made by the defendant to the plaintiff's claim is that all this property is now standing in the name of Mussamut Luchmee Kooer by virtue, and as the result, of a considerable number of transfers and alienations, all of which were made upon paper by Ram Pershad Sahoy solely in order to defraud his creditors, and that the present

laintiff has, therefore, no right to come into ourt and ask the Court to relieve him from ny difficulties which may have been caused him in the way of enjoying this property a consequence of his deceased brother's audulent conveyances.

Both the lower Courts have found that, nder the peculiar circumstances of this case, e plaintiff has a right to obtain from the ourt the declaration which he seeks against e defendant.

We are of opinion, however, that the cision of the Lower Appellate Court in this spect must be somewhat modified. We nk that the contention of the defendant, at the plaintiff is not entitled to the assistce of the Civil Court to get him out of e difficulties which the fraudulent conveyces of his deceased brother may have led n into, is substantially correct. He cerinly is not entitled, standing as he professes do in the shoes of Ram Pershad Sahoy, to the assistance of this Court to rectify e deeds of transfer which Ram Pershad hoy had, in fraud of his creditors, put into eir present shape. Neither is he entitled, as hird person might be, to ask the Court that se documents should all be treated as documts void at law, and therefore that they put out of all consideration. Nevertheis, it does seem to be the case upon the facts ich both the lower Courts arrived at, t the Rs. 100 in the Collectorate is the ney which had, so to speak, accrued due the estate of Luchmee Kooer while she alive, and which ought to go with it. e Courts find that the plaintiff has, in fact, ceeded Luchmee Kooer in that estate, and think that he is entitled to have it dered as against the defendant that this 100 belongs to him.

We think that the declaration ought to stop re. The decree of the Lower Appellate urt will therefore be varied to this extent. will stand as to costs, and we think that same order ought to be here, namely, t both parties ought to bear their own ts.

The 19th February 1873.

Present:

e Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

ortgage-bond—Interest—Penalty—Liquited Damages—Principles of Construction.

Case No. 709 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 9th January 1872, modifying a decision of the Subordinate Judge of that District, dated the 2nd December 1870.

Bhichuck Nath Panday (Plaintiff), *Appellant,*

versus

Ram Lochun Singh (Defendant), *Respondent.*

Baboos Romesh Chunder Mitter and *Kalee Kishen Sen* for Appellant.

Baboo Taruck Nath Dutt for Respondent.

R L S borrowed Rs. 600, agreeing to pay interest at 8 annas per cent. *per mensem*, and to repay the principal within three years; and executed a bond pledging as security a one anna four pie share of an estate bearing a sudder jumma of Rs. 380, and containing a stipulation that, if he failed to pay principal and interest as agreed upon, he would pay interest at 4 per cent. *per mensem* from date of the bond. Default was made in the payment of the principal at the end of three years, and the mortgagee sued upon the bond claiming the higher rate of interest. Both the lower Courts treated the stipulation as in the nature of a penalty, and the Lower Appellate Court gave judgment for the principal amount with interest at 12 per cent. *per annum* in satisfaction of such penalty:

HELD, that Act XXVIII. of 1855, s. 2, did not affect the question of penalty or no penalty, but left it open for the Court to decide whether the 4 per cent. was agreed upon as interest, or whether it was intended as a penalty.

The hinge upon which the decision of every particular case turns is the intention of the parties collected from the language they have used. The mere use of the term "penalty," or "liquidated damages," or "interest," does not determine the intention; but like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument.

If the instrument contains many stipulations of varying importance or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation applying generally to a breach of all or any of them was intended to be a penalty, and not liquidated damages; similarly, where a very large sum becomes immediately payable in consequence of the payment of a very small sum, the former should be considered a penalty. Applying these principles to the case, the Court held that the decision of the Lower Appellate Court was correct.

Pontifex, J.—THIS appeal arises in a suit on a bond executed by the respondent to the appellant, which bond, so far as it is material to state it, was as follows:—

"I, Ram Lochun Singh, execute this to "the effect following: I have borrowed "and received the sum of Co.'s Rs. 600 "on interest from Bhichuck Nath Panday, "and agreed to pay interest on the said "amount at 8 annas per cent., month after "month, and to repay the principal money "within the period of three years. For the "said amount, principal and interest, I do "hereby mortgage and pledge one anna four "pie out of the entire mehal Koonduwar, "bearing a sudder jumma of Rs. 380.

"Should the mehal in question happen to be "sold by auction for arrears of Government "revenue, to be attached, or sold, or involved, "in a suit for debts due to other creditors, "this mahajun or creditor shall have author-"ity to realize the money by any means he "chooses without waiting for the expiration "of the term of this bond. Should I fail "to pay the principal and interest as agreed "upon, I shall pay interest at 4 per cent. "per month from date of this bond to that "of liquidation. On this agreement I have "taken the money and given the bond or "writing."

From this it appears that, if default was not made in payment of the principal and interest, the loan was made at less than the usual rate of interest; but it would also appear from the amount of the sudder jumma that the property hypothecated was an ample security for the loan.

Both of the lower Courts have decided that the provision in the bond which is to take effect on default of punctual payment must be treated as in the nature of a penalty, and the Judge of Bhaugulpore has accordingly given a judgment to the appellant for the principal amount lent together with interest calculated at 12 per cent. per annum in satisfaction of such penalty.

The facts of the case are that default was made in payment of the principal at the expiration of three years from the date of the bond. It does not clearly appear, but I will assume for the purpose of this decision that default was made throughout the three years in payment of the monthly interest. The appellant might have sued on the bond for each monthly instalment of interest. This he did not do. But one month and 20 days after the expiration of the period of three years, the appellant instituted the present suit. It would appear that the respondent was, at the date of the institution of the suit, prepared to pay the principal (with the exception of a trifling sum of Rs. 25 about which there was a dispute, but which the respondent agreed to pay if appellant would vouch for it having been advanced), but objected to pay interest at the rate of 4 per cent. per mensem according to the default proviso in the bond.

The appellant before us insists, that having regard to section 2, Act XXVIII. of 1855, the Court is bound to decree the interest at 4 per cent. per mensem, and cannot relieve against the proviso as being in the nature of a penalty.

The words of that section are: "In any "suit in which interest is recoverable, the "amount shall be adjudged or decreed by the "Court at the rate (if any) agreed upon by "the parties."

But that section, in our opinion, does not affect the question of penalty or no penalty. It leaves it still open for the Court to decide whether the 4 per cent. per mensem was agreed upon by the parties as "interest," or whether it was intended as a penalty. Otherwise in no case, however gross and oppressive it might be, if the parties used the word "interest," could the Court interfere.

Such argument is met by the numerous cases which decide that the question to be determined of penalty or no penalty is not affected by the phraseology that may be used. The parties to an instrument cannot change the fact by using a particular name, as whether the sum provided to be paid is to be treated as a penalty, or as liquidated damages is a question of law to be decided by the Court upon a consideration of the whole instrument in each case.

Sainter *vs.* Ferguson, 7 C. B., 716; 27 L. J., C. P., 217.

It has been laid down by the Privy Council in the case of Dinach *vs.* Corlett, 12 M. I. C. C., 229, that the law on the question of penalty or liquidated damages may be considered, after a great number of decisions, not perhaps all of them strictly reconcileable with each other, to be at length satisfactorily settled; and the hinge on which the decision in every particular case turns is the intention of the parties collected from the language they have used. The mere use of the term "penalty," or the term "liquidated damages" (or in the present case we may add the term "interest"), does not determine that intention; but like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance is, however, of great importance towards arriving at a conclusion. If the instrument contains many stipulations of varying importance, relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty, and not in the nature of liquidated damages. To the principle so laid down by the Privy Council may be added the observations of Chief Justice Tyndal in the case of Kemble *vs.* Farren, 3 M. & G. 440 (S. C., 6 Bing., 141): "That a very large "sum should become immediately payable in "consequence of the non-payment of a very "small sum, and that the former should be

be considered a penalty appears to be a contradiction in terms; the case being precisely that in which Courts of Equity have always relieved, and against which Courts of law have also in modern times endeavoured to relieve, by directing juries to measure and assess the damages actually sustained by the breach of the agreement." Applying these principles to the case before us, if one day's default was made in payment at the end of any, even the first, month of the three years' term, of the interest at the rate of one-half per cent. per mensem, a very large rate of 4 per cent. per mensem would immediately become payable throughout the term; or, in other words, a very large sum would become immediately payable in consequence of the unpunctual payment of a very small sum.

Or, again, if interest at the rate of one-half per cent. per mensem had been punctually paid for the first 34 months of the term, but one day's default was made in payment of the interest of the 35th month at that rate, 4 per cent. per mensem would immediately become payable from the very commencement of the term; or, in other words, a very large sum would become immediately payable in consequence of the unpunctual payment of a very small sum, and notwithstanding punctual payment at the lesser rate for months.

Or, again, if interest at the lesser rate had been punctually paid for 35 months, but one day's default was made in payment of principal sum and the interest for the month, an increased sum of Rs. 252 would become immediately payable in respect of interest for the higher rate from the commencement of the term, or, in other words, in consequence of one day's default in payment of Rs. 603, the larger sum of Rs. 855 would immediately become payable. The pleader for the appellant has pressed upon us a decision by Justices Louis Jackson and Paul in Special Appeal No. 428 of 1871, which has not been reported. The facts in that case have been placed before us and from them it appears that for securing a loan of Rs. 8,000 for three months, a bond was given which carried interest at 5 per cent. per mensem, but contained a proviso that, in the event of the Rs. 8,000 not being re-paid at the end of the three months, an enhanced rate of interest at 5 per cent. per mensem would be levied in lieu of the first-named interest from the date of the execution of the bond to the date of liquidation thereof.

The special appeal was by the debtor, whose ground of appeal was that the lower Court had been wrong in awarding interest at 5 per cent. per mensem, inasmuch as the condition in the bond was of the nature of a penalty.

The only observations by the learned Judges in that case were: "The special appeal is dismissed with costs."

In that case the period over which an enhanced payment of interest would extend was only three months, and seemingly the proviso only took effect upon default in payment of principal, nor does it appear that there was any other than personal security for the debt. But, however this may have been, we think every case of this nature must depend on its own circumstances as stated by the late Mr. Justice E. Jackson in the case reported at 14 Weekly Reporter, page 436, and we are of opinion that the present case falls within the principle of the case reported in 4 Bengal Law Reports, Appendix, page 92,* and of Kemble *vs.* Farren.

It has been argued with some plausibility that, if the bond in this case had contained the stipulation that interest at 4 per cent. per mensem should be paid, reducible to ½ per cent. on punctual payment, the Court must have decreed interest at the rate of 4 per cent. per mensem; and further, that the proviso in the bond should be construed as an alternative stipulation arising in the happening of a particular event; and that, as that event has arisen, the proviso is now the only substantive agreement between the parties. But the answer to this argument is, that, instead of being an alternative stipulation arising on an independent event, it is, in fact, only a proviso to arise on a breach of the original and substantial contract between the parties; and the question is whether such proviso is to be treated as a penalty, or as a stipulation in the nature of liquidated damages for such breach of contract. And with respect to the argument that, if the stipulation had been 4 per cent. per mensem, reducible on punctual payment, interest at 4 per cent. per mensem must have been awarded, it may be observed that, in that case, 4 per cent. per mensem would have been the substantive primary contract between the parties, and not a penal rate to arise on breach of the substantive contract; and that it is improbable that any borrower, having ample security to offer, as was the fact in the present case, would enter into a

* 14 W. R. 437, note.

contract under which he would be primarily liable to pay 48 per cent. per annum for the loan.

Under the circumstances of this case, we are, therefore, of opinion that the decisions of the Courts below are correct in treating the proviso in the bond as in the nature of a penalty; and we also think that the Lower Appellate Court has done substantial justice between the parties in awarding damages for the breach of contract by decreeing interest at the rate of one per cent. per mensem from the date of the bond, and we accordingly think that this special appeal should be dismissed with costs.

The 27th February 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Contract to create a Putnee—Inadequate Consideration—Equitable Relief.

Case No. 780 of 1872.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 16th February 1872, affirming a decision of the Subordinate Judge of Pubna, dated the 25th March 1871.

Juseemooddeen Biswas (Plaintiff), *Appellant,*

versus

Huro Soonduree Dossee and others (Defendants), *Respondents.*

Mr. J. T. Woodroffe and *Baboos Mohinee Mohun Roy* and *Issur Chunder Chuckerbutty* for Appellant.

Baboos Sreenath Doss, Bhugobutty Churn Ghose, and *Gopal Chunder Chuckerbutty* for Respondents.

Defendants borrowed money from plaintiff without interest; but executed a deed stipulating that the sum borrowed was to be re-paid on a given date, and that, if not paid then, the defendants should execute a putnee lease of certain properties set forth in the deed, the sum borrowed being considered as a bonus for such lease; and that, if the borrowers did not execute such a lease, this deed should be counted as a putnee pottah. The money not having been paid, and the lease not executed, the plaintiffs sued for possession:

HELD, that plaintiffs were entitled to possession on the footing of a putnee from the date of suit, and that the transaction was not a conditional sale, but a contract to create a putnee for a certain consideration unless that sum was paid on a particular date.

HELD, that plaintiff was entitled to relief even though he might have asked for something to which he was not strictly entitled; and that if the Court deemed the bonus inadequate, it might equitably relieve defendant upon the payment of the original sum with interest from the date of advance.

Kemp, J.—THE plaintiff is the special appellant.

The case turns upon the construction of a deed dated the 30th Pous 1274.

The special appellant contends that according to the terms of the deed and the intentions of the parties, the Courts below ought to have treated the transaction as a putnee lease from the 2nd Bysack 1277, and that they were wrong in holding that the instrument was one of conditional sale within the meaning of Regulation XVII. of 1806.

The terms of the deed may be briefly stated thus—

Haranund Bhuttacharjee and Rutnesse Pal Chowdhry borrow Rs. 1,625 from the plaintiff on the 30th of Pous 1274 B. No interest is charged, and it is stipulated that the sum borrowed is to be paid in the lump on the 30th Cheyt 1276 B. That, if the money borrowed is not paid on or before the 30th of Cheyt 1276, the defendant shall execute a putnee lease of certain properties set forth in the deed, the original sum borrowed, or Rs. 1,625, being considered as the bonus for such lease. Further that, if the borrowers did not execute a putnee pottah, this deed shall be counted as a pottah as dating from the 2nd Bysack 12[illegible]. Further, that if owing to the sale of the parent estate by the borrowers failing to pay the Government revenue, the putnee should fall with the parent estate, then the original sum borrowed was made recoverable from the surplus proceeds of the parent estate. Then there is a further stipulation that if, during the term prescribed for the payment of the amount borrowed, or from the 30th of Pous 1274 to the 30th of Cheyt 1276, the parent estate be sold, and no putnee can be created, then the amount borrowed with interest and costs is to be recovered from the other moveable and immoveable properties of the borrowers.

The plaint sets forth that the money was not paid, and that the borrowers have not executed a putnee lease. The suit is, therefore, brought for possession of the properties mentioned in the deed as comprising the putnee tenure.

Before the suit was brought, Rutnesse Pal Chowdhry, one of the debtors, died, leaving a widow, Huro Soonduree, who has been made a defendant.

Huro Soonduree's answer was briefly to the effect that the conditions in the deed

granting the putnee, were in the nature a penalty, that the plaintiff ought to have ved her with a notice to pay, that a suit the money borrowed might lie, but not one specific performance.

The defendant, Haranund Bhuttacharjee, ies the execution of the document, and es that Rutnessur Pal Chowdhry, though servant, had no authority from him to r into any such contract, and that the perties mentioned in the deed belong to , Haranund Bhuttacharjee, and not to nessur Pal Chowdhry.

he Judge finds that the deed is one of itional sale, and not a simple contract; the plaintiff was bound by law to give the ndants notice of foreclosure under section egulation XVII. of 1806, and not having so, a suit for possession will not lie. suit of the plaintiff was therefore dis- d.

e questions raised in the answer of the dant, Haranund Bhuttacharjee, were not ed by the Judge. There has also been nding as to the value of the putnee pro- s.

oking to the terms of the deed and the tions and conduct of the parties, we are y of opinion that we ought to declare the plaintiff is entitled to possession of roperties recited in the deed on the g of a putnee, such possession to com- e from date of suit. The plaintiff ned no interest whatever on the sum ced, *viz.*, on Rs. 1,625, from the 30th of 1274 to the 30th Cheyt 1276, and the n of profit reserved to the plaintiff as edar according to the deed was only 5 odd, a very inadequate return for the y lent. It is true that the profit is now ated by the plaintiff to amount to 00 per annum, but even that sum would y a little over 12 per cent. on the sum wed, to say nothing of the fact that for ears the plaintiff got no interest at all is money. The instrument has been d by both Courts to be genuine, and there een no offer of payment of the sum wed.

e proprietary title of the defendants as dars is not extinguished by this deed. plaintiff becomes their putneedar just in me way as if he had taken a putnee aying a bonus of Rs. 1,625. The trans- is not a conditional sale but a con- e create a putnee in favor of the plaint- a certain date, and for the certain con- ion of Rs. 1,625, unless that sum be without interest on a particular date.

Regulation XVII. of 1806 applie sto conditional sales which are to become absolute on the happening of certain conditions. If a mortgagee be put in possession with the enjoyment of the usufruct in satisfaction of the debt, in such case, before the sale can become absolute, it will be necessary for him to foreclose under the provisions of the above Regulation.

We think that the Courts below were clearly wrong in dismissing the plaintiff's suit in its entirety. The plaintiff is entitled to relief even though he may have asked for something to which he is not strictly entitled. The plaintiff, though not entitled to an irredeemable putnee, is entitled to hold possession, even supposing that, in consequence of the value of the putnee lease stipulated for by the contract, greatly exceeding the sum of Rs. 1,625 (which question, although evidence has been adduced by Huro Soonduree that the assets are from Rs. 600 to 800, has not been tried by the lower Court), the Court might think it equitable to relieve Huro Soonduree from the putnee upon payment of the sum of Rs. 1,625 with proper interest from the date of the advance.

With reference to the defendant, Haranund Bhuttacharjee, who has been made a respondent, as there has been no finding as to his title, and whether he gave Rutnessur authority to execute the deed on his behalf, our decision must be without prejudice to his rights, and he is entitled to his costs in this Court.

The decision of the Judge as far as Huro Soonduree is concerned is reversed, and the special appeal decreed with costs payable by her.

The 6th March 1873.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Lord Justice Mellish, Sir Robert P. Collier, and Sir Lawrence Peel.

Joint Property.—Findings on Facts.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Joynarain Giri

versus

Sheeb Proshad Giri and others.

*From the judgment of Kemp and E. Jackson, J.J., in Regular Appeal No. 167 of 1867, decided 24th February 1868.

The ordinary rule which the Privy Council have observed respecting the findings on questions of fact by two Courts was held to apply to the following case, in which plaintiff alleged that he and defendant had lived in commensality, and enjoyed certain joint property of which defendant being the elder was the manager, and applied for his share thereof. Defendant alleged that the property was not joint. On this issue both Courts had found against the defendants.

The Privy Council saw no ground for reversing the decision of the lower Courts.

THEIR LORDSHIPS are of opinion that the ordinary rule which they have observed respecting the findings on questions of fact by two Courts applies in this case. It was a case in which the plaintiff alleged that he and the defendant had lived in commensality, and enjoyed certain joint property of which the defendant being the elder was the manager; that the defendant had claimed exclusive possession as against him, and their commensality had ceased, and he applied for his share of the joint property. The defendant alleged that the property was not joint. Upon that issue both Courts have found against him; and it is not now contended that the finding is not right with respect to the bulk of the property. But it is alleged that, with respect to a certain portion of the plaintiff's claim, the decision is wrong, or at all events that some further inquiries should be instituted. That portion of the claim is this: It appears that the plaintiff and defendant held a joint lease of certain khas lands from the Government, and certain joint property had been deposited as a security for the payment of the rent of the Government, but the defendant alleges that, since the institution of this suit, that property had been taken possession of by the Government in consequence of the failure of the ryots to pay the rent, which he attributes to a certain cyclone which occurred in 1864, wherefore he was unable to pay the plaintiff his share of it; and he further alleges that all papers connected with the transaction by which he could prove this part of his allegation were lost in the cyclone. Both Courts appear to have disbelieved the defendant's statement upon this matter, which was almost entirely unsupported by any evidence except his own, that evidence being of a very unsatisfactory character. It appears to their Lordships that the whole of this part of the case was, in fact, before both Courts, and the defendant, if he had a case, might have proved it, and they are not disposed to set aside the finding of the Courts that the plaintiff is entitled to his half of this joint property which was deposited as a security for the payment of the rent with the Government. As to the amount of mesne-profits to which he would be entitled, that is another question, but that has not been concluded, and will be determined upon execution. It appears to their Lordships that this is the only matter upon which any inquiry could be necessary, and upon this an inquiry will be held. There was also a question as to the plaintiff's right to recover certain nij-jote lands which, the defendant said, he had given up to the landlord. The Courts below did not believe his story upon that, they did not believe that he proved that they were given up to the landlord; but if they have been given up to the landlord, then the plaintiff will not get them in execution.

On the whole their Lordships see no ground for reversing the decision of the two Courts, which appears to be on questions of fact which they have properly inquired into; and under these circumstances, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgment of the Court below.

The 6th March 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Sale Certificate—Descriptive Terms.

Case No. 361 of 1872.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Chittagong, dated the 29th November 1871, affirming a decision of the Moonsiff of Seetakoond, dated the 30th November 1870.

Shaikh Kuleemooddeen Daroga (Plaintiff) *Appellant,*

versus

Ashruf Ali Khan and another (Defendants) *Respondents.*

Baboos Hurree Mohun Chuckerbutty and *Aukhil Chunder Sen* for Appellant.

Mr. H. E. Mendies for Respondents.

Where a sale certificate declares the sale of the right of a particular party in land of which the identity is not a matter in dispute, the mere circumstance that the right thus transferred is called by mistake jotedakhsh instead of by some other term nearly importing the same thing, does not constitute a difficulty in the way of giving the purchaser possession of the land.

Jackson, J.—THE dispute in this case was as to what precisely the plaintiff had p

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sed at a sale in execution. The plaintiff ed to get possession of 8 gundas of land, ing, as we understand, only a small part of lands, which, whether correctly or incorrtly described, were sold in that execution-oceeding. In the sale-certificate that ich is sold is described as being a edakhalee right established by the judgnt-debtor under a decree of the Principal dder Ameen of a certain date.

The Moonsiff seems to have been at some ins to discover what was the precise nature the right of the judgment-debtor which s sold, and he came to the conclusion that was a shikmee talooka right, and then ause the interest sold was described as a edarree right, he concluded that the judgnt-debtor's shikmee talooka right did pass by the sale. This was objected to ppeal, and the Subordinate Judge holds the ground of appeal is not weighty.

We have been referred to a decision of a vision Bench of this Court reported at page , Weekly Reporter, Volume XV., in the e of William Bruce Manson *vs.* Golam bria Moonshee, in which one of the learned dges observes: "I think that, in looking o the sale-certificate, we must not merely ook to the words of it, but we must endeaour to ascertain what was intended to be old; a mere misdescription would not efeat the purchaser's right."

We should hesitate in assenting expressly the doctrine there laid down, because the option of it might lead to dangerous conquences; but in the present instance it pears to us that the sale-certificate having clared the sale of the rights of a particular ty in the land, of which the identity not a matter in dispute, the mere circumnce that the right thus transferred is ed by mistake jotedakhalee, instead of by ne other term nearly importing the same ng, does not constitute a difficulty in the y of giving the purchaser possession of land. The land, we are told, is further ntified by the mention in the sale-certifie of the jumma at which the judgmentbtor's right, whether talookee or otherwise, eally held. This is more specially so, as find that the dispute merely relates to a all portion of the lands sold, the question g really whether that small portion was prised within those lands or not. That g so, we think the judgment of the wer Appellate Court affirming that of the onsiff must be reversed, and the plaintiff's decreed with costs.

The 11th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Partnership—Suit for Accounts—Limitation—Act XIV. of 1859, s. 1, cls. 9 & 16.

Case No. 971 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 29th April 1872, reversing a decision of the Moonsiff of Serampore, dated the 31st January 1872.

Kalee Kristo Roy Chowdhry (Plaintiff), *Appellant,*

versus

Haran Chunder Dey and another (Defendants), *Respondents.*

Baboo Chunder Nath Bose for Appellant.

Baboo Umbika Churn Banerjee for Respondents.

A suit for an account of a partnership where in plaintiff filed with the plaint a statement of the mode in which the account ought to be made up was held (following the decision in 7 W. R., p. 36) to be governed by the limitation prescribed by Act XIV. of 1859, s. 1, cl. 16, which gives six years from the date of dissolution.

Where there was a clause in the agreement by which defendants, the working partners, undertook to be liable for any outstandings in respect of goods sold on credit, the sale of goods on credit was held not to be any breach of contract, and not to bring the suit under cl. 9.

Markby, J.—It appears that this was a suit in which there were three questions to be decided between the parties.

The suit was for an account of what the plaintiff alleged to be a partnership, and he annexed to his plaint a statement of the mode in which the said account ought to be made up; and the three questions to be decided were, first, whether the relationship between the parties was that of partners, or, as the defendant alleged, that of master and servant; the second point to be decided was whether the whole suit was barred by limitation; and the third point to be decided was whether any of the particular items in the accounts was barred.

The Moonsiff decided that the relationship between the parties was that of partners, that the suit was not barred by limitation, and then he made up the account

between the parties giving the plaintiff something less than what he claimed.

Both the parties appealed, and the Subordinate Judge has given a judgment in this case which we find extremely difficult to understand. He does not seem to consider that the whole suit is barred by limitation, and he expresses no opinion whatever as to whether or not he agrees with the Moonsiff in his finding that the relationship between the parties was that of partners. But because he considers that one item of the accounts was barred by the Law of Limitation, he sets aside the whole decree of the Moonsiff and remands the whole case to him to be re-tried. Now, even supposing that the Subordinate Judge was right in finding that this item in the accounts was barred, still he would be wrong in remanding the case. The only result of that finding would have been that he could have struck that item out of the account; and then, if he concurred with the Moonsiff as to the relationship of partners existing between the parties, he could have given a decree accordingly.

The case now coming up here in special appeal, it is contended that the decision of the Subordinate Judge on this item of the accounts was wrong. On the other hand, by way of cross-appeal, it is contended by the respondents that the whole suit was barred. Therefore the whole question raised in the first Court is now before us.

As regards the question whether the whole suit is barred (which is perhaps one of some nicety), we shall follow the decision of this Court reported in the 7th Weekly Reporter, page 36, where it was held that a suit for an account and for the plaintiff's share of the profits after an admitted dissolution of partnership is governed by the limitation prescribed by clause 16, section 1 of Act XIV. of 1859, which gives six years from the date of dissolution. As to the application of the Law of Limitation to the item in question, the facts stand thus: There was a clause in the agreement by which the defendants, who were working partners, undertook with the plaintiff, who supplied the capital, to carry on a business on the understanding that they would be liable for any outstandings in respect of goods sold on credit. And the Subordinate Judge, upon a decision of Her Majesty in Council, reported in Volume XVI. of the Weekly Reporter, page 35, Privy Council Rulings, has held that this item is barred, because (as he puts it) the defendant, by selling goods on credit, had violated the terms of their contract, and that, therefore, so far as this item is concerned, this is a claim for a breach of contract, and therefore barred by clause 9, section 1 of Act XIV. of 1859. We think that this is not a right view of the case. We do not think that this can be treated as a suit for breach of contract. We think that all that the parties intended was that, when the accounts should be made up in respect of all goods sold on credit, it should be taken as if the defendants had received payment in full. And upon that view of the transaction, it does not appear to us that there was any cause of action which could cause the Statute of Limitation to run during the currency of the partnership. It seems to us that there was no cause of action at all until the dissolution of partnership, and then there was but one cause of action, namely, for an account of the profits of the partnership received by the defendant. The case to which the Subordinate Judge has referred us is one of a totally different character. That was not in the nature of a suit for accounts, but a suit by a principal against this *del credere* agent for the recovery of a specified sum of money due on a balance of account. The agreement between the parties in this case merely contains a clause directing the mode in which the accounts between the partners were to be made up, and we think clause 9 of section 1 of Act XIV. of 1859 is not applicable, and therefore the whole case falls within the decision in the 7th Weekly Reporter referred to above.

The result is that we must remand the case to the Subordinate Judge to do that which he ought to have done before, namely, to determine whether or not he agrees with the Moonsiff in thinking that the relationship of partners exists between the parties.

We may also remark that, even if the Subordinate Judge thought it necessary to remand this case, it was his duty to have remanded it, not upon any such general observation as he has made, but by a clear and express order, either laying down the issue or issues to be determined, or pointing out the erroneous procedure of the first Court in coming to its decision. In point of fact, however, the decision of the Moonsiff as regards the law is right, and that of the Subordinate Judge is wrong.

The 13th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Registration—Possession—Act XX. of 1866, s. 50.

Case No. 980 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 18th April 1872, reversing a decision of the Moonsiff of Radhanuggur, dated the 6th June 1871.

Soodha Ram Bhuttacharjee (one of the Defendants), *Appellant,*

versus

Odhoy Chunder Banerjee and others (Plaintiffs), *Respondents.*

Baboo Umbica Churn Banerjee for Appellant.

Baboo Nil Madhub Sen for Respondents.

Where a plaintiff came into Court upon an unregistered bond nearly twelve years after its execution, and was met by an allegation of possession under a deed of sale by his mortgagor:

HELD, that the registered deed must prevail over the unregistered bond with reference to Act XX. of 1866, s. 50, notwithstanding the mortgage-bond was executed before the Act came into operation, the principle of the section having been contained in the previous Acts XIX. of 1843, s. 2, and XVI. of 1864, s. 68.

Markby, J.—THE plaintiff in this case sues upon an unregistered bond in which the defendant Krishto Dhone had pledged, as security for a loan, a tank called Radha Sair. The bond purports to have been executed on the 9th Joysto 1266. The defendant did not appear, though duly summoned, but Soodha Ram Bhuttacharjee appeared and asked to be made a party to the suit, alleging that he was in possession of the tank by virtue of a deed of sale executed by Krishto Dhone Bose on the 4th Srabun 1274, and duly registered.

The first Court found that the plaintiff's bond was a forged document, and for that reason dismissed the suit without going into the question of the validity of the deed of sale propounded by Soodha Ram.

On appeal, the Judge held that the bond was genuine; he also held that the deed of sale was a well-attested deed, and that the bond did not interfere with it. He was of opinion that Soodha Ram must be considered to have bought the tank encumbered with the mortgage; and that the registered deed of sale could not prevail over the unregistered mortgage-bond. His order is not clear, but the only interpretation to be put upon it is that he gave the plaintiff a decree for the sum due confirming his right as mortgagee of the tank.

Soodha Ram appeals, and it is urged on his behalf that the Judge is wrong in holding that the registered deed of sale does not prevail over the unregistered deed of mortgage. There can be no doubt that, immediately after his purchase, Soodha Ram obtained possession of the tank. The plaintiff raised no objection to the change of possession. He comes into Court upon an unregistered bond nearly twelve years after its execution. He is met by an allegation of possession under a registered deed of sale by his mortgagor to Soodha Ram. We think that there can be no doubt that the registered deed of sale must prevail over the unregistered mortgage-deed. The question is governed by section 50 of Act XX. of 1866. That section provides that "every instrument of "the kinds mentioned in clauses 1, 2, and 3 of "section 18 shall, if duly registered, take "effect as regards property comprised there-"in against every unregistered instrument "relating to the same property, whether such "other instrument be of the same nature as "the registered instrument or not;" and if it applies, then the plaintiff's mortgage-bond being unregistered cannot prevail against the defendant Soodha Ram's purchase-deed, which, though of later date, was duly registered. It seems to us to be a reasonable construction of the Act that it does apply to such a case. It is contended that it does not, because the mortgage-bond was executed before the Act came into operation. But the provisions of this section are not new. The principle of them is contained in the previous Acts XIX. of 1843, section 2, and XVI. of 1864, section 68. If these provisions of the Registration Act did not apply to instruments previously executed, the law of registration would be full of anomalies, and titles which were once secure would become insecure when a new Registration Act was passed. Had it been intended that these provisions should not be so far retrospective, the successive Acts when repealed would have been kept in force in this respect as to documents already executed. When Act XIX. of 1843 was passed, express provision was made that these provisions should not apply to documents executed before a certain date. No such provision is contained in the subsequent Acts. But the explanation of section 50 in the present Act (VIII. of 1871) clearly

assumes that the Act applies to deeds already in existence.

The respondent has relied on the decision reported in 10 Weekly Reporter, page 65, but that case is, we think, distinguishable. Mr. Justice Macpherson there says distinctly that, "if it were a mere question as to which deed was to be given effect to, the plaintiff" (who had purchased under a prior unregistered bill of sale) "is not entitled to recover," *i.e.*, to recover as against the defendant who had purchased under a subsequent bill of sale which had been duly registered. But the learned Judge goes on to show that the first purchaser had been eleven years in possession, and that, therefore, his position was "far stronger than if he were seeking possession for the first time under his deed of sale; and the question is not merely one as to the effect to be given to a deed as against a deed of later date;" and Mr. Justice Bayley also relies on the fact that the unregistered purchase had obtained possession.

The principle that runs through this and a number of other similar cases seems to be this, that non-registration will not impair the validity of a deed executed in good faith, under the old law in force at the time of execution under which registration was optional, if possession had actually been acquired and enjoyed before the execution of the second deed.

In the case before us the mortgagee never had possession. The mortgagor sold the property to the defendant, and the deed of sale was duly registered, and possession was acquired by the defendant. Under such circumstances, the registered deed of sale must prevail over the unregistered mortgage, and the plaintiff can only obtain a decree for money lent against Krishto Dhone Bose.

We observe the Judge has said that the grounds of the Moonsiff's judgment are mere conjectures, and that his reasons are frivolous. We are wholly unable to concur in that observation. We think that they were worthy of the Judge's most careful consideration.

No decree has been drawn up by the Judge in this case, except that the "appeal is decreed;" a decree which it would have been impossible for the plaintiff to execute. As, however, the judgment is wrong in point of law, we set aside the decree of the Lower Appellate Court, and direct that the plaintiff do have a personal decree against the defendant Krishto Dhone for the sum of Rs. 99-1-8, with interest at 5 per cent. from this date until payment, and that the suit so far as it seeks to render the property purchased by the defendant Soodha Ram liable under the mortgage-bond executed by Krishto Dhone in the year 1266 B. S. be dismissed, and that the plaintiff do pay to the defendant Soodha Ram his costs in this Court and the Courts below.

The 15th March 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges.*

Act VIII. (B. C.) of 1869, s. 37—Measurement.

Case No. 866 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 14th March 1872, reversing a decision of the Additional Sudder Moonsiff of that District, dated the 2nd September 1871.

Santee Ram Panjah and others (Plaintiffs), *Appellants,*

versus

Bykunt Parya and others (Defendants), *Respondents.*

Baboo Bhyrub Chunder Banerjee for Appellants.

Baboo Jadub Chunder Seal for Respondents.

The principle laid down in the decisions in 16 W. R., p. 126, and 18 W. R., p. 332, *viz.*, that a mere shareholder could not apply for measurement, was held to be equally applicable to a suit for measurement of land under Act VIII. (B. C.) of 1869, s. 37.

Mitter, J.—In this special appeal we think we are bound to follow the principle laid down in the decisions reported in page 126, Volume XVI., and in page 332, Volume XVIII. of the Weekly Reporter. It has been argued that these were cases decided with special reference to the provisions of section 10, Act VI. of 1862, and section 38, Act VIII. of 1869 of the Bengal Council. But the principle of those decisions appears to be equally applicable to a case like the present, which is brought under section 37 of the last-mentioned Act. The same words "proprietor of the estate or tenure" which occur in section 38 also occur in section 25, and as it is by section 25 that "the right to measure," referred to in section 37, is to be determined, the distinction relied upon by the appellant must necessarily fall to the ground.

We reject the special appeal with costs.

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The 17th March 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Loans—Security—Decree.

Case No. 10 of 1872.

Miscellaneous Appeal from an order passed by the Judge of the Twenty-four Pergunnahs, dated the 2nd August 1872, reversing an order of the Moonsiff of Diamond Harbour, dated the 1st June 1872.

Kalee Pershad Singh Nundee (Decree-holder), *Appellant,*

versus

Raye Kishoree Dossee (Judgment-debtor), *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Mohendro Lall Mitter for Respondent.

In a suit to recover money which had been lent on the security of a mortgage upon certain immoveable property, the first Court gave a decree for payment of the amount claimed with costs and interests, and for recovery of the same by sale of the property pledged:

HELD, that the decree did not limit plaintiff's right to recover the money only by sale of the property in question; and that defendant's personal liability arose on receipt of the money, the mortgage merely giving additional security.

Jackson, J.—THIS case appears to us to be very clear. The plaintiff lent money to the defendant, and obtained, by way of security for the loan, a mortgage upon certain immoveable property of the defendant. He then brought a suit to recover the money, and made a special prayer in the suit that the property pledged be made liable to satisfy his claim. Thereupon, the Moonsiff's Court gave a decree to plaintiff in these terms:—

"এ মোকদ্দমার নিষ্পত্তি রায়ের হেতুবাদ মতে হুকুম হইল যে দাবি মায় খরচা মাসিক সতকরা মঃ ১ টাকা হারে সুদ সহিত প্রতিবাদিনীর প্রতিকূলে ডীক্রি হয়। আবদ্ধীয় সম্পত্তি হইতে টাকা আদায় হয়" i that is to say, that there be a judgment against the defendant to pay the amount sued for with costs and interest at the rate of one per cent. per mensem, and, further, that the amount be recovered by sale of the property pledged. The Judge considers the decree to limit the plaintiff's right to recover the money only by sale of the property in question, and it is contended before us for the respondent that this is the true meaning of the decree, as the mortgage-bond said nothing as to the defendant's personal liability to pay the money.

It appears to us that no express stipulation to that effect was necessary, and that the defendant's personal liability arose as soon as she received the money from the plaintiff, the mortgage merely giving the latter an additional security in the shape of the pledged property. The decree accordingly directed quite properly that the amount claimed be recovered from the defendant.

The order of the Lower Appellate Court must be set aside, and plaintiff will be entitled to proceed with the execution. The plaintiff will get his costs, Rs. 32, in this Court.

The 17th March 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Remand—Act VIII. of 1859, s. 351—Issues—Appeal—Jurisdiction.

Case No. 386 of 1872.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 9th December 1871, reversing a decision of the Moonsiff of Raojan, dated the 13th May 1871.

Bodun Burooah (Plaintiff), *Appellant,*

versus

Abdool Gunny and others (Defendants), *Respondents.*

Baboo Aukhil Chunder Sen for Appellant.

No one for Respondents.

A Subordinate Judge in appeal, having framed an issue, remanded the case under s. 351, Code of Civil Procedure, to the first Court for trial thereof; but instead of directing that the finding should be returned to his own Court, he directed the Moonsiff to give plaintiff a decree in accordance with the finding at which he might arrive. The Moonsiff having decided the case accordingly, it went up in appeal before the Additional Judge:

HELD, that the proper course for the Additional Judge was simply to confine himself to considering whether the decision of the Court below on the issue directed was correct or not; he had no power to go behind the order of the Subordinate Judge on the previous occasion.

Jackson, J.—THE decision of the Lower Appellate Court is erroneous. The Moonsiff, in his judgment of the 13th May 1871, after an order of remand by the Subordinate Judge,

remarked that the only issue for trial was "what are the respective shares of the mortgagor Hashmut Ali and the other defendants in the disputed land," and this issue accordingly he determines. The case going again in appeal, the Additional Judge states: "I think that this decision is incomplete, and upon the point upon which I think it incomplete the respondent urges that he could have produced more evidence before the lower Court had he not deemed it unnecessary. The case will therefore have to be remanded." He goes on to say: "The lower Court has, in its decision, expressed its inability to take up at all the question of 'wuqf' on account of the Appellate Court having previously determined it, and the lower Court would be right had the Appellate Court fixed an issue or issues and returned the record under section 354," and he points out that the remand was under section 351. There is no doubt that the order of the Subordinate Judge at the first hearing of the appeal was not quite in accordance with the law. He did, we think, dispose of the question as to wuqf, but considered that the framing of an issue as to the shares and a finding on that issue was necessary. He therefore made an order of that kind; but instead of directing that the finding should be returned to his own Court, he directed the Moonsiff to give plaintiff a decree in accordance with the finding at which he might arrive on the issue then directed. That being so, the Additional Judge in the present judgment was, we think, wrong. He ought simply to have confined himself to considering whether the decision of the Court below on the issue directed was correct or not. He had no power to go behind the order of the Subordinate Judge on the previous occasion. The case must accordingly go back.

The 17th March 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Possession—Title—Limitation—Admissions.

Case No. 391 of 1872.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Chittagong, dated the 14th September 1871, affirming a decision of the Moonsiff of Deang, dated the 24th January 1871.

Shaik Ozeer Ali and another (Defendants), *Appellants,*

versus

Shaik Mukbool Ali and others (Plaintiffs), *Respondents.*

Baboo Aukhil Chunder Sen for Appellants.

Mr. R. E. Twidale for Respondents.

In a suit for confirmation of possession by declaration of title, HELD that it was not sufficient for the plaintiffs to show that possession was with them; they were bound to make out their title; and that, in respect to a portion of the land, which defendants admittedly held in possession, the plea of limitation could not be avoided by the plaintiffs admitting that the defendants were their tenants.

Jackson, J.—It appears to us that the decisions of the Lower Appellate Court and of the Court of first instance are erroneous upon the two grounds argued in this special appeal, firstly, that as to a portion of the land which the defendants admittedly hold in possession, and in respect of which they plead limitation, the Courts below were not warranted in holding that limitation is avoided by the plaintiffs' admission that the defendants were their tenants. If, indeed, the plaintiffs could prove their allegation, there would be no adverse holding, and consequently no limitation; but it appears that the plaintiffs had no evidence on this point. Therefore the defendants' plea on this point of the case is valid.

On the second point, *viz.*, as to plot No. 2, the defendants show that the land comprised in that plot was settled with them by the Government in December 1868. The plaintiffs rely on possession, which, in the opinion of the Lower Appellate Court, is shown to be with the plaintiffs, notwithstanding the settlement. This will not suffice, regard being had to the nature of the suit and the decree which the plaintiffs sought. They asked not for possession, but for confirmation of it by declaration of their title, and their suit for declaration of title cannot succeed, unless they make out that title of which there is no evidence in the present case. The plaintiffs' entire suit therefore ought to have been dismissed. The judgments of both the lower Courts are set aside, and the plaintiffs' suit dismissed with all costs.

The 24th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Sale for Arrears of Revenue—Jurisdiction—Act XI. of 1859—Irregularities.

Case No. 599 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 21st December 1871, affirming a decision of the Moonsiff of Tajpore, dated the 26th July 1871.

Musst. Luleeta Kooer and others (Plaintiffs), *Appellants,*

versus

The Collector of Tirhoot and others (Defendants), *Respondents.*

Baboos Nil Madhub Bose and *Kalee Prosunno Dutt* for Appellants.

Mr. A. F. Lingham and *Baboos Unnoda Pershad Banerjee* and *Iarucknath Palit* for Respondents.

In a sale for arrears of Government revenue, a Collector need not specify the kists in respect of which the arrears have accrued; his doing so does not hinder a Civil Court from going into the inquiry whether arrears existed in respect of those kists.

A sale under Act XI. of 1859 may not be set aside on the ground of irregularity in the issue of notices, unless such irregularity is shown to have caused loss or damage to the defaulter.

Phear, J.—We do not think that any good ground of special appeal has been established in this case.

The first objection raised by the appellant is to the effect that, inasmuch as the Collector specified the kists in respect of which the arrears had accrued, the Court ought to have confined itself to the inquiry whether those particular arrears existed or not.

We think that this is not a valid ground of objection. Clearly, the Collector need not have specified the arrears, unless he had so chosen, and the fact that he did so does not limit the ground upon which the sale can be defended.

And the second ground of special appeal, which is somewhat connected with the first, is to the effect that the lotbundee which specified the arrears also stated that there were no arrears in respect of the kists of the preceding year. Therefore, the Court ought not to have gone into the inquiry whether in fact there were arrears in respect of those kists. The reason why we think this ground is not a good one is the same which we have just given in regard to the first, namely, that the lotbundee specification was unnecessary on the part of the Collector, and could not be conclusive for either party. The truth is that in this case the appellant himself sought to show that the arrears for the first half of 1275 mentioned in this lotbundee were wrong: that in fact there were no such arrears. It seems to us that the Government is just as much entitled to show that the other statement which appears in the same paper, namely, that there were no arrears of the kists of 1274, is also incorrect.

The last objection made on special appeal is that the lower Court has not tried whether the prescribed notifications under Act XI. of 1859 had been properly issued. The Court has, we think, to some extent tried that question. But there seems to be a fatal objection to our allowing this matter of complaint, namely, that the appellant has not attempted to show that, if there was any such irregularity as that which he now alleges, that irregularity so operated as to cause any loss to himself. We understand that there is no evidence on the record to show that he was damaged at the sale by reason of any particular irregularity having occurred in the matter of these notices.

We have already held that the objection to the plea of limitation was a good one; but, inasmuch as the other objections bearing on the merits of the case cannot, in our opinion, be sustained, the appeal must be dismissed with costs.

There will be two sets of costs for the two sets of respondents.

The 24th March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Rent-suit against Shareholder—Onus Probandi—Intervenor—Decision without Jurisdiction—Evidence.

Case No. 640 of 1872.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30th December 1871, affirming a decision of the Moonsiff of Tajpore, dated the 29th July 1871.

Sookram Misser (Defendant), *Appellant*,

versus

W. Crowdy (Plaintiff), *Respondent*.

Baboo Doorga Doss Dutt for Appellant.

Baboo Umbika Churn Banerjee for Respondent.

Where, under a ticca pottah granted to him by several shareholders, plaintiff claimed the share of rent said to be due to him by defendant (another shareholder) in respect of the occupation of a certain quantity of the zeraet land which constituted the holding of the combined shareholders, and the defendant objected that the plaintiff's share was less than what he stated it to be:

HELD, that the burden of proving the extent of his share lay on the plaintiff. In such a case, even a ryot resisting the claim of a shareholder to rent would be entitled, if he had good reason to do so, to make the plaintiff prove the amount of his share; and the only *onus* on an intervenor would be to prove *bonâ-fide* possession.

A decision set aside by a superior Court, as made without jurisdiction cannot have any probative force whatever between the parties.

Phear, J.—IT was no doubt a melancholy task for a Court which had to judge of facts to be called upon to come to a determination of fact upon such material as this record is made up of. But still we think that the judgment of the Lower Appellate Court might certainly have been more perspicuous than it is. As far as we understand the case, the plaintiff claims, under a *ticca pottah* granted to him by 5 or 6 out of several shareholders, the share of the rent which is said to be due to him from the defendant, another shareholder, in respect of the occupation of a certain quantity of the zeraet land which constitutes the holding of combined shareholders.

The first objection that the defendant makes is that the plaintiff's share in the estate is less than what he states it to be. And the Judge says: "With regard to the first objection, which contends that the plaintiff's share is less than he states it to be, I have only to say that the defendant has failed to show what plaintiff's share really was, or how it is less than the plaintiff makes it out to be."

This seems to be a somewhat strange mode of approaching the question, because apparently the burden of proving the affirmative of this question lay upon the plaintiff. We see nothing in the case which should induce us to think that the burden of disproving the plaintiff's allegation lay on the defendant, rather than that the burden of proving the affirmative of it lay on the plaintiff.

The Judge goes on to say: "The defendant had full opportunity to prove this, and "he should have done so, as the matter of "proofs lay with him (though it may be said "it lay with the plaintiff)." We confess that we have been quite unable to understand this passage. Then the Judge says: "Seeing that his statement was not of such a "character as to throw the *onus* of proof on "the plaintiff with reference to Act X. of "1859, he had no right to dispute the "share, for, under section 77 of that Act, "only an intervenor who had been injured "could object, a ryot having no right to "do so."

It appears to us that the Judge must have been under some misapprehension even as to what the case would have been if the proceedings had been taken under the provisions of Act X. of 1859. A ryot who, in such a case as this, is resisting the claim of a shareholder to rent, is, we apprehend, entitled, if he has good reason to do so, to make the plaintiff prove that which he alleges is the amount of his share. Of course, if the plaintiff comes into Court with any evidence which amounts to an admission on the part of the ryot of the extent of his share, there is an end of the matter on his side, and the *onus* is shifted The Judge remarks: "In "such cases the *onus* would lie on the inter-"venor." In such cases, however, we apprehend the *onus* which would lie upon the intervenor would be merely the *onus* of proving that he was in *bonâ-fide* possession. He would, in truth, have nothing to do with the question as to the amount of the plaintiff's share, except so far as it might be involved in the question as to possession and enjoyment.

The Judge then goes on to say: "As "section 77 has been omitted in Act VIII. of "1869, it is difficult now for a ryot to "object— but it would be unfair not to give "him a fair chance. I have, therefore, allow-"ed him to object, placing him in the posi-"tion of an intervenor, making the *onus* of "proof rest on him."

We thus come, it seems, to the reason which induced the Judge of the Lower Appellate Court to think that the burden of proving the affirmative of the plaintiff's case lay upon the defendant. We are bound to say that we think his reasoning is insufficient. It appears to us distinctly that it lay upon the plaintiff in this suit, in support of the allegations which he made relative to his cause of action, to prove the extent of his share, unless the defendant admitted it to be that which he (the plaintiff) alleged; but, as we have already said, the

rst objection which the defendant made as an objection to the correctness of this legation.

The Lower Appellate Court next deals ith the evidence of the defendant bearing on this point. It says: "He has only cited two witnesses, who merely state that plaintiff holds a 7 annas 3 gundahs share in ticca belonging to Sheeboo Misser; they do not say how they obtained this information, which is, moreover, far too general. He failed to cite any other shareholders as a witness, nor did he call for any jummabundees from them, or prove by the evidence of ryots that the plaintiff only collected rents for a 7 annas 3 gundahs share. Under these circumstances, I consider that on that point defendant has failed to substantiate the objections urged.

"Next, with regard to plaintiff's proof, I would observe that he files a Moonsiff's decision dated 6th June 1868 (alluded to above) to prove his possession of a 9 annas 9 gundahs share.

"On appeal against that order, defendant omitted to raise any objections against the share; his vakeel too urged that that decision had been reversed, and that it should not be accepted as proof."

It was the fact that this decision was versed; but it was not merely reversed, was set aside as having been the decision a Court not having jurisdiction to enter- n and determine the matter in the suit. e Judge proceeds: "I cannot consider hat decision as *full* proof, though it may be of use to the plaintiff, for the defendant by his silence on that point acknowledges its correctness."

A decision, which is no decision at all, hich has been set aside by a superior Court the ground that it was passed without isdiction, cannot be considered to have y probative force whatever between the rties. It is true that silence on the part a defendant during the trial of a case in gard to any matter brought against him in e course of the case might possibly be some value afterwards irrespective of the ecree, as amounting to an admission on s part that that which was alleged, and th regard to which he had kept silence, s true. But we need not hardly say that is a very different thing from the use hich the Judge makes of the decree itself. e Judge goes on to say:—

"Besides this the plaintiff has cited a utwaree and several witnesses to prove "that he has collected rents for the share "which he states he holds."

That must mean, if it means any thing, that he had collected rents in respect of the same share from other ryots, for it is admitted in this case that no rents have been collected by the plaintiff from the present defendant at any time.

Then the Judge says: "I find there is a "decision of the Zillah Judge, dated 7th "June 1870, in a case brought against another "defendant holding a similar share. That "suit being exactly like the one under con- "sideration helps to assist the plaintiff, for the "plaintiff in that case got a decree in accord- "ance with the share he stated. It may be "urged that the defendant being no party "to that suit is not bound by it, no more he "is. I merely say that it is unnecessary for "a malik to prove his share before every "ryot, that fact being once proved is enough, "and will always stand good in suit against "any of his ryots. This decides his share "to be what it is."

So that it seems that the Judge, after stating very correctly that the defendant was not bound by that decision, he having been no party to it, goes on to determine the case upon the ground that he was bound by it, because the malik, having once established his share in a former suit against another person, is not obliged to establish the same against every one of his ryots; it stands good against any of his ryots including therefore the present defendant.

And the Judge concludes: "And the "defendant's objections are worthless, and "merely urged to bar some of the years for "which rent is claimed."

It is quite clear without any further discussion that the Judge has committed error in passing to his conclusion in the way in which he has done, namely, his conclusion that the issue relative to the amount of the plaintiff's share was made out as between the plaintiff and the defendant in the way which he traced out. No part of the material to which the Judge refers, whether afforded on the side of the plaintiff or on the side of the defendant, appears to us in the slightest degree to make out the allegations of the plaintiff on this head.

It has been urged before us by the learned pleader who has appeared on behalf of the respondent that, even if the Judge's decision cannot be upheld upon the face of his judgment, still there is evidence on the record which is sufficient to support it; and that, if that is so, we ought not here on special appeal

to disturb it. In view of this argument we have had considerable part of the testimony of the witnesses in the Court below read to us. So far as we can understand that evidence, none of it goes the length which is necessary in order to prove the plaintiff's case in this particular. And we may add that it seems to us that the plaintiff has not set out on the right road to obtain success of any sort in this litigation. The evidence on the record appears to disclose a somewhat complicated relation as to occupation and liability to pay rent between the plaintiff (or rather his assignors) and the other shareholders. Even if he had succeeded in showing, as he does not seem to have done, what is the extent of the share which he has received out of his assignor's share in the entire holding, he has failed utterly in showing, in truth he has hardly made any effort to show, how much land the defendant is occupying in excess of his proper share, for which excess land alone he would be liable to pay rent to his co-sharers. It would seem that there was some recognized amount which each co-sharer was entitled in proportion to his share to occupy without payment of rent, and so he would only be liable to pay rent at all when he occupied in excess of that quantity; and further he would, of course, be only liable to pay any given shareholder in actual money the difference between that which he was liable to pay and that which he was entitled to receive. None of these matters seems to have inquired into at all in the Court below, and we hardly see how they could have been inquired into in a suit which has been brought in the shape which this suit bears. It would seem to be almost necessary that *all* the parties concerned should have been brought before the Court in *one* suit before their respective equities, *inter se*, could be determined.

We have made these remarks with regard to the character of the plaintiff's claim and the circumstances under which the suit is brought, in order to show that, in our judgments, the failure of the plaintiff to prove the particular share which he had obtained in the property was merely the first failure in a series of steps which he must take before he can make out that he is entitled to receive rent from the defendant, and for which he has made no preparation whatever.

This being so, it seems to us that there is no other course open to us than to reverse the decision of the Court below, and that, while reversing the decision of the Court below, we must also dismiss the plaintiff's suit with costs in all the Courts. It is useless to send back the case for any further proceedings to be taken.

The 25th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Sale of Lakheraj Land—Mokurruree Tenure—Onus Probandi—Presumption.

Case No. 797 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 6th February 1872, affirming a decision of the Subordinate Judge of that District dated the 4th March 1870.

Juggessur Mookerjee and another (Plaintiffs), *Appellants,*

versus

Annund Moyee Dossee and others (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Taruck Nath Sen and *Sreenath Doss* for Respondents.

Where a party purchases at an execution-sale the rights and interests of a lakherajdar, and another claims a mourosee tenure in the property so purchased, the claimant is bound to establish his mokurruree title.

If the latter and his predecessors have been collecting rents from the ryots for a considerable number of years and the jumma payable to the lakherajdar has all the time remained unchanged, the mourosee right claimed may be presumed to exist, although claimant may not be able to produce his pottah to that effect.

Markby, J.—In this case the District Judge considers that "the burden of proof lies full upon the plaintiff." But this is not so. The plaintiff purchased at an auction-sale the rights and interests of his judgment-debtor Mahomed Ali, who was the lakherajdar, and the defendant claims a mourosee tenure in the property so purchased which he must establish.

If, however, the defendant and his predecessors have been collecting the rents from the ryots for a considerable number of years, and the jumma payable to the lakherajdar has, during all that time, remained unchanged, the District Judge will be at liberty to presume therefrom that the defendant has the mourosee right which he claims, although he may not be able to produce his pottah to that effect. This is what the Subordinate Judge

ppears to have found on the second issue, nd the District Judge will have to consider hether there is any reason for disturbing his finding. But his present decision in hich he requires the lakherajdar to prove has possession within twelve years before alling upon the defendant to prove his okurruree title cannot be supported.

The case will be remanded to the District udge for re-trial.

The 25th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Sale for Arrears—Deposit by third Party—Liability of Proprietor.

Case No. 922 of 1872.

pecial Appeal from a decision passed by the Judge of West Burdwan, dated the 26th February 1872, reversing a decision of the Moonsiff of Kadhanuggur, dated the 25th May 1871.

Khettur Mohun Banerjee and another (Defendants), *Appellants,*

versus

Haradhun Chatterjee (Plaintiff), *Respondent.*

aboo Bungshee Dhur Sen for Appellants.

Baboo Anund Chunder Ghossal for Respondent.

Plaintiff purchased at an execution-sale a share of 's tenure which had been attached on account of a oney-decree. Subsequently, the whole tenure was ertised for sale in execution of a decree for arrears ent. On applying to the Moonsiff, he was told that, e deposited the whole amount due, the sale would be yed. He did so and prevented the sale. He now s K to recover the amount deposited:

HELD, that the payment was neither officious nor untary; and that K, who had enjoyed the profits of land, was equitably liable for the sum paid to save om sale.

Birch, J.—THE plaintiff Haradhun Chatter- e purchased benamee, at an execution- le, on the 3rd July 1868, 10 beeghas of e defendant Khettur Mohun's tenure ached, and put up to sale at the instance Shokho Monee, who held a money-decree inst Khettur Mohun. Subsequently, in cution of a decree for arrears of rent ained by the zemindar on the 22nd August the same year, the whole of Khettur Mohun's tenure was attached and advertised for sale. In the lotbundee the tenure was divided into several plots. Plaintiff applied to the Moonsiff to sell the whole tenure, or to let him deposit the amount due and stay the sale. An order was passed to the effect that, if he deposited the whole amount due, sale would be stayed. Upon this order the plaintiff deposited the whole amount due and prevented the sale. He now sues to recover from Khettur Mohun the amount he has deposited.

It is urged before us that the arrears of rent accrued upon the tenure prior to the plaintiff's purchase, and that the portion of the tenure purchased by the plaintiff could not have been sold in execution of the decree for arrears of rent. It is further argued that the payment of the arrears due from Khettur Mohun by the plaintiff was a voluntary payment for which Khettur Mohun cannot be made liable We cannot consider the payment made by plaintiff in any sense a voluntary payment. By purchase at execution-sale the plaintiff had become a co-sharer in the tenure, and was entitled to protect it from sale for arrears of rent which had accrued thereon. He yielded to the necessity imposed upon him by the Moonsiff of depositing the whole sum due upon the tenure merely for the purpose of relieving himself from the inconvenience and loss consequent upon the tenure being sold. He had no alternative but to deposit the whole amount claimed, or to stand by and see a tenure in which he had acquired an interest sold. He acted *bonâ fide*, and it would be inequitable to hold that Khettur Mohun is not liable for the sum paid by the plaintiff to save the sale. Khettur Mohun enjoyed the profits of the land for the period for which the arrears had accrued, and the tenure is still secured to him. It is perfectly clear that the whole tenure would have been put up to sale for the arrears of rent which had accrued, if the plaintiff had not stayed the sale by depositing the whole amount due, and under such circumstances we cannot say that the payment made by plaintiff was officious or voluntary. We dismiss the special appeal with costs.

The 28th March 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Special Appeal—Presumptions.

Case No. 57 of 1872.

Special Appeal from a decision passed by the Judicial Commissioner of Ranchee, dated the 27th September 1871, reversing a decision of the Subordinate Judge of Gya, dated the 18th May 1871.

Mussamut Akjoo Bibee and another (two of the Defendants), *Appellants*,

versus

Koonjo Beharee Lall (Plaintiff), *Respondent*.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Appellants.

Baboo Nil Madhub Sein for Respondent.

Where the Lower Appellate Court concluded against the genuineness of a deed of sale to certain appellants, on a presumption arising from the existence of a possessory lease to other parties, and rested his decision entirely on such presumption, his decision was set aside in special appeal on the ground that the presumption did not necessarily arise.

Pontifex, J.—In August 1850, one Hossein Ali Khan mortgaged 4 annas out of his 8-annas share in the village Khurjara.

In 1864, on the death of his sister Koodrutoonissa, Hossein Ali succeeded to a further 2 annas 8 pie share.

In 1863, the property was attached in execution of a money-decree obtained by the mortgagee against Hossein Ali.

The appellants preferred an objection to the sale of the property on the ground of their title hereafter referred to. A proceeding was held under section 246, where, as it appeared that the appellant's claim extended only to 3 annas 4 pie, it was ordered that the right, title, and interest of Hossein Ali in 10 annas 8 pie should be sold subject to notice to the appellants. On the 8th of December 1869, the sale was made, and the plaintiff (respondent) purchased and obtained a sale-certificate, and was put in possession by the Court. Subsequently, on the 26th of April 1871, as alleged by the plaintiff, he was opposed in collecting the rents, and the corn in the barn on the land was carried away.

The respondent, therefore, instituted the present suit for possession, but he did not originally make the appellants defendants. They, however, intervened, and were made defendants, and set up a claim to a 3 annas 4 pie share as having been conveyed to them or their predecessors in title on the 16th of March 1854. They also alleged that a 4-annas share had been leased to Abid Ali and Toolsee Sahoo previous to 1850.

Upon this allegation the 4th issue in the suit was raised as follows: "4th.—The "statement of these defendants being that "they purchased 4-annas share of Hossein "Ali, judgment-debtor, before auction-sale, "whether or not they are in possession of "the same."

No issue was raised as to the *bona fides* of the appellant's alleged conveyance, although from the objection preferred by them under section 246 the nature of their claim must have been known.

Upon that issue the Subordinate Judge of Gya held that the appellants and their predecessors in title had all along held possession of the property comprised in their deed of sale from the date thereof, and that, on turning to such deed, it appeared that it was a duly registered one, most of its witnesses having been vakeels and mookhtears who are all dead. That it was attested by two witnesses, one of whom admitted his signature, but stated that he did not remember any fact with regard to sale, and that not a title of doubt can be entertained as to the genuineness of the deed; and that the possession of the appellant in the property sold to them had been entirely proved by the evidence of three witnesses.

On appeal to the Judicial Commissioner, the respondent raised an objection that the deed set up by the appellants was fictitious—a question which had not been put in issue or raised before the first Court.

The Judicial Commissioner has dissented from the conclusion arrived at by the first Court that the deed was genuine, and the appellant's possession proved, in consequence of a presumption which he raises from the fact that there was a possessory lease to Abid Ali for 27 years from 1244, and consequently in existence at the time the appellants allege that their purchase was made; and from the fact that the predecessor in title of one of the appellants himself purchased a part of that lease in 1265. From these facts he presumes that the appellant's deed was fictitious, and reversed the decision of the first Court.

We cannot concur in this decision. We do not agree that the facts relied on necessarily raise any such presumption. It would appear that the lease to Abid Ali was of 4 annas only out of 8 annas then belonging to the lessor. The existence of such a lease would not necessarily prevent a purchase by the appellant's predecessors of 3 annas 4 pie in 1854, and a purchase of a portion of such

lease in 1858 by one of them is not inconsistent with the previous purchase by them of the lessor's estate in 3 annas 4 pie.

As the Judicial Commissioner has rested his decision entirely on presumption—which presumption we think does not necessarily arise—we must overrule his decision, and confirm the decision of the Subordinate Judge founded on the evidence before him, with costs.

The 31st March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Execution-sale of Mortgaged Property—Intervenors—Act VIII. of 1859, s. 246.

Cases Nos. 741 and 801 of 1872.

Special Appeals from a decision passed by the Judge of Shahabad, dated the 22nd February 1872, affirming a decision of the Subordinate Judge of that District, dated the 6th September 1871.

Shaikh Eida and others (Defendants), *Appellants,*

versus

Ram Jug Pandey and others (Plaintiffs), *Respondents.*

Baboos Doorga Mohun Dass and *Mohesh Chunder Chowdhry* for Appellants.

Mr. R. E. Twidale and *Baboos Romesh Chunder Mitter* and *Mohinee Mohun Roy* for Respondents.

Plaintiff had a mortgage-bond covering certain property, and suing upon it obtained a decree on 30th April 1866, declaring his lien, and ordering a sale of the mortgaged premises. After this one E obtained a bond from the judgment-debtors, mortgaging to him the same property as security. On the 16th June 1868, plaintiff petitioned for a sale of the property according to the decree. Upon this two sets of objectors came in, *viz.*, E and P, the latter claiming a moiety on the ground of a conveyance to him, by the judgment-debtors, on the 30th June 1868. The Moonsiff upheld E's objection to the extent of a moiety of the estate originally mortgaged, and, overruling P's objection, ordered the rights and interests of the judgment-debtors to be sold. A sale was had, and plaintiff bought what was sold. He now sues to recover his purchase, claiming the whole property mortgaged; E and P being permitted to intervene:

HELD that neither the bond to E, nor the conveyance to P could create a new ownership, in third persons, against the decree of April 1866; that the proceedings of the Moonsiff upon the objections of E and P had the effect of bringing about an abortive and inoperative sale; and that the plaintiff was entitled to a refund of his consideration-money.

Quære.—Was it right for the Moonsiff to entertain E and P's objections under Act VIII. of 1859, s. 246?

Phear, J.—In this case, it appears that the present plaintiff had a mortgage-bond covering certain property which is now the subject of the present suit granted to him by the lessors of Gopal Sahoo and Gridharee Sahoo, and he brought a suit against them to enforce his mortgage-lien; in this suit he obtained a decree on the 30th April 1866, declaring his lien, and ordering a sale of the mortgaged premises. On the 16th June 1868, he petitioned for a sale of this property according to the decree. Upon this two sets of objectors came in, who were respectively represented by Eida and Purmessur. Their objections were entertained and disposed of by proceedings held under section 246 of the Civil Procedure Code. The Moonsiff before whom the matter came upheld Eida's objection to the extent of 2 annas and 2 pie, being one moiety of the whole 4 annas and 4 pie originally mortgaged, and made an order to that effect on the 24th December 1868. He found more difficulty in determining the right course to take with regard to Purmessur's objection. Ultimately, however, he appears in some sense to have overruled it, and came to the conclusion that the rights and interests of the judgment-debtors should be sold, and he made an order (to which we shall probably have to refer again) bearing upon this point on the 28th December 1868.

The next day, 29th December, a sale was had, and the judgment-creditor, the original mortgagee himself, bought what was then sold. He now brings the present suit upon the footing of the purchase which he thus made against the original judgment-debtors, seeking to recover that which he had purchased, and which he alleges was the 4 annas 4 pie share of the mouzah. In this suit Eida and Purmessur were permitted to intervene. He has succeeded below in getting a decree against all the defendants for the full amount, namely, 4 annas 4 pie.

We will now go back a little in time in order to get at the origin of Eida's and Purmessur's claim.

It seems that, after the present plaintiff had obtained the decree in April 1866, which ordered the sale of the mortgaged property, *i. e.*, on the 18th April 1868, Eida obtained a bond from the judgment-debtors, which mortgaged to him the same property, the whole 4 annas 4 pie, to secure the mortgage-debt. It will be perceived that this was before the present plaintiff had preferred his petition for sale, for that was on the 16th June 1868. It further appears that

on the 30th June 1868, the judgment-debtors conveyed 2 annas 2 pie to Purmessur. In this state of things, plaintiff's petition for sale still pending, the present defendant Eida, on the 21st July 1868, brought a suit upon his bond of April, and in September of the same year obtained a decree against Gopal Sahoo and Gridharee Sahoo (the present plaintiff's judgment-debtors), declaring his lien, and ordering a sale of the mortgaged property. He appears to have applied for a sale accordingly. Some third person then intervened, alleging that they had previously purchased 2 annas 2 pie, and in consequence of this objection, that share or moiety was released. And Eida, on the 11th December 1868, upon the sale thus obtained by himself, bought the remaining 2 annas 2 pie. It was upon the footing of his decree of September 1868, and eventually of his purchase of December 1868, that Eida intervened upon the present plaintiff's petition for sale, and succeeded, as we have already said, in inducing the Moonsiff to exclude his 2 annas 2 pie from the property to be sold.

Purmessur also intervened upon the footing of his conveyance of the 30th June 1868. And it was the complication introduced, as I understood, by these different proceedings which so effectually puzzled the Moonsiff that he found himself reduced to the necessity of making the order of the 28th December 1868, an order which has been interpreted to us as simply an order for the sale of the rights and interests of the judgment-debtors.

With this explanation we think we are able to say what it was that really did happen at the sale of the 29th December.

The present plaintiff had petitioned to have the property sold, which was previously decreed to be sold. But the Moonsiff had made an order on the 24th December that the 2 annas 2 pie claimed by Eida should not be sold. And it seems to us that the result of the order of the 28th December 1868 was that, as regards the rest of the property, only the right, title, and interest of the judgment-debtors should be sold. The sale of the 29th December followed immediately on these orders, in fact, was the effect of those orders. Now the rights and interests of the judgment-debtors in the property at that date were, on the facts which we have stated, absolutely *nil*. They had parted with 2 annas 2 pie to Eida as the result of the decree of September 1868 and the sale which followed thereon in December 1868; and they had parted with another 2 annas 2 pie to Purmessur as the result of the conveyance of the 30th June 1868. And if that be so, of course there was nothing which could pass to the present plaintiff by virtue of the Moonsiff's sale of the 29th December; if he merely sold, as he seems to have done, the then existing rights and interests of the judgment-debtors. But the truth is that that order for sale of the Moonsiff was inapplicable to the present case. The present plaintiff had a right to have the property sold which had been originally pledged to him and which had been decreed to be sold by the Court's decretal order of the 30th April 1866. It was no proper order for sale upon that decree which directed the rights and interests of the judgment-debtors to be sold as they stood on the 28th December 1868. It seems to us that the order of the Moonsiff and the sale had by him on the day following did not affect the sale of the property or any portion of the property which was decreed to be sold by the decretal order of April 1866.

We will not stay to inquire whether it was a right course in a case like this to entertain objections, and to deal with them precisely under the words of section 246 of the Civil Procedure Code. But, supposing it were so, it seems to us clear that either the bond of April 1868 to Eida, or the conveyance of June 1868 to Purmessur could not, as against the decree of the 30th April 1866, create a new ownership in, so to speak, third persons. At the time when Eida and Purmessur took under those conveyances, the subject which they took was already a matter of suit, and a decree had been passed which directed it to be sold and they could take it in no other way than as subject to the rights of the parties in the suit. If the Moonsiff made any real inquiry at all upon the objections of these interveners, he ought at once to have been satisfied that the title which they put forward did not serve to distinguish them from the judgment-debtors; they had, by their own account, taken the property which was the subject of suit *pendente lite*, and they could not stand in a better position with regard to it than the vendor from whom they took, and against whom a decree had, at that time, already been made in respect to this very property. The Moonsiff ought, even under the strict provisions of section 246 of the Civil Procedure Code, to have treated the objectors as being, on their own showing, none other than the judgment-debtors themselves.

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Therefore, it appears to us clear that the proceedings of the Moonsiff upon the matter of objection put forward by Eida and Purnessur altogether miscarried, and had the effect of bringing about an abortive sale. In his view, we are bound to dismiss the plaintiff's suit, because he has got no title to claim these lands under that pretended sale. But of course we ought not to limit our decree to this simple form; the plaintiff's interests must, at the same time, be protected for we are able to do this, inasmuch as all the persons concerned in the matter are parties to the present suit), his interests must be protected by a declaration that that sale was an abortive inoperative sale, and that the plaintiff is entitled to a refund of any money which he has paid as consideration for the purchase. It seems, however, that we are not in a position to make this latter declaration at the present moment, because we understand the judgment-debtors are not here before us in Appellate Court.

Under these circumstances, we think that we must withhold our final decree until notice has been given to the judgment-debtors to appear here.

Probably the best course will be to adjourn the matter for a month, in order that notice may be given to the judgment-debtors to appear in this appeal.

We have expressed the views which we at present hold as to the form which the decree might to take in order to do complete justice between the parties. But if the parties will come to some agreement, such as that which has been suggested during the hearing by the Court, the decree may be made still more complete, namely, it may by consent be decreed that the sale be set aside, and that a new sale of the property decreed to be sold be effected; and, further, either that the money which has been paid into Court should be refunded to the plaintiff, or that it should remain there, and be taken as the first bid on the part of the plaintiff in the new sale. Of course, all this can be done only by an agreement between the parties. For the present we will adjourn the matter for a month, and give notice to the judgment-debtors, in order that they may appear at the expiration of that period with information as to that which has now been suggested.

The 26th February 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Shebaitnama—Registration—Act XVI. of 1864, s. 13.

Case No. 304 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 11th December 1871, affirming a decision of the Subordinate Judge of that District, dated the 28th April 1871.

Gireedhur Doss Mohunt (Plaintiff), *Appellant,*

versus

Nitto Gopal Doss and another (Defendants), *Respondents.*

Mr. H. E. Mendies and *Baboos Nil Madhub Bose* and *Rash Beharee Ghose* for Appellant.

Baboos Motee Lall Mookerjee and *Gooroo Doss Banerjee* for Respondents.

A shebaitnama which conveys no right or interest, but merely declares that a particular portion of the thakoor's income shall be expended through the instrumentality of the shebait in the worship of the thakoor, is not a deed requiring to be registered under Act XVI. of 1864.

Jackson, J.—It seems to us that the Courts below have been over-stringent in excluding the shebaitnama from inspection on the ground that it required registration. In order to bring it within the terms of section 13, Act XVI. of 1864, it must be an instrument "which purports or operates to create, declare, "transfer, or extinguish any right, title, or in-"terest of the value of Rs. 100, or upwards, "in any immoveable property, or any instru-"ment which acknowledges the right or pay-"ment of any consideration on account of the "creation, declaration, transfer, or extinction "of any right, title, or interest as above," and so on.

It may be that the stipend which was allowed to plaintiff in this case, and which is directed to be expended in daily worship of the thakoor, might yield him some little surplus or other, but as observed by my brother Mitter in the course of the argument, it cannot be contended that the plaintiff derived under the document a right of embezzlement.

We must presume that the money dedicated for the use of the thakoor would be properly

expended for the object for which it was intended.

Then it is said that the payment of Rs. 24 a month out of the proceeds of the estate created a charge in favor of the thakoor, but it does not appear to us that the deed purports to create, declare, or transfer any right which did not exist.

The property out of the proceeds of which the amount had to be derived was already the property of the thakoor. Before excluding any document under the provisions of the Act, it is necessary to see that it clearly comes within those provisions. In the present document there is no declaration of the thakoor's right or interest. It merely contains a declaration that a particular portion of the thakoor's income should be expended through the instrumentality of the plaintiff in the worship of the thakoor. In fact, it is a sort of appointment of the plaintiff to expend that particular portion of the money which comes from the akrah. As far as the instrument itself goes, it does not purport to convey to plaintiff any interest beyond that already mentioned in any immoveable property. If, under his appointment as shebait, the plaintiff is entitled to any advantages such as that of residence in the akrah, or otherwise, that is rather incidental to the office of shebait than created by the document. We think the decision of the Court below on this point should be set aside, and the case remanded to that Court to be tried on the other points arising in it.

The 5th March 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo Law—Stridhun—Misrepresentation by Husband—Estoppel—Heirs.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Luchmun Chunder Geer Gossain and another

versus

Kalli Churn Singh and others.

* From the judgment of Macpherson and Glover, JJ., in Regular Appeal No. 143 of 1867, decided 15th April 1868.

Mr. Doyne and *Mr. John Cutler* for Appellants.

Mr. Leith, Q. C., and *Mr. Bell* for Respondents.

Under the Hindoo law a married woman is at liberty to make any disposition she likes of money constituting her stridhun or separate and peculiar property; and if she purchases immoveable property with such stridhun, she has a right to sell that immoveable property.

Where the husband during his lifetime did in every way, both publicly and privately, whenever called upon to make any representation on the subject, always represent that certain immoveable property was his wife's, the purchasers from her could not, after his death, be equitably turned out of the property in favor of his heirs. The heirs after his death would be as much bound by the father's misrepresentations as he would have been during his life.

THIS was an appeal by the defendants in the suit from a judgment and decree of the High Court of Calcutta, dated the 1st April 1868, affirming in part, and reversing in part, a judgment and decree of the Principal Sudder Ameen of Rajshahye, dated the 16th of March 1867.

The facts appear from the following, which are the material portions of the judgments of the said Judges:—

Glover, J.—"This was a suit by one Kalli Churn, the adopted son of Uben Singh, for himself, and as guardian of his minor brother Rajcoomar Singh, to set aside a deed of sale made in 1270 B.S. by their mother Ulpa Burmoneeah, on the ground that the property (a durputnee mehal called Tuti Boalea, &c.) belonged to his father's estate and as such, descended to him (Kalli Churn) and to his minor brother, and was never the separate property of Ulpa Burmoneeah, who had, in consequence, no right to sell it. Certain other parties to whom Kalli Churn said to have sold half of the mehal (in anticipation) for the purpose of defraying the costs of suit were made co-plaintiffs. The Gossains, defendants, after taking several objections as to the age and adoption of Kalli Churn, alleged that the mehal was bought by Ulpa Burmoneeah with her own funds; that she was the recognized proprietress, and had power to dispose of the property in any way she liked; that she did dispose of it to them (defendants) on the 8th Falgoon 1270 for a consideration of Rs. 12,000, and that they have been since in undisturbed possession. Ulpa Burmoneeah filed a somewhat similar reply; she admitted the sale to the Gossains, but instead of claiming the estate as purchased with her own stridhun-money, pleaded that her husband had bought it, and made it over to her in gift. The Principal Sudder Ameen considered that the conveyance to Ulpa by her husband was merely

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nominal; that he furnished the money for the purchase, and retained the management of the property up to his death; that Ulpa had consequently no interest in the mehal, and no right to sell to the Gossains. He therefore decreed for the plaintiffs. The Gossains appeal, and Mr. Doyne on their behalf contends, *first*, that the money for the purchase of the durputnee is proved to have been Ulpa's; *second*, that, if it were not, the husband Ubotar Singh gave out to all the world persistently to the day of his death that the estate was his wife's, and that therefore the Gossains, being innocent purchasers for value without notice, must be confirmed in possession; *third*, that the plaintiff (Kalli Churn) consented to the sale, and if not already concluded by his adopting father's acts is concluded by his own. Other objections were taken at the hearing as to the adoption of Kalli Churn, which were, however, not pressed. On the first ground of appeal, I find for the respondent there is a large quantity of oral evidence adduced on either side to prove the source of the purchase-money, but none of the witnesses for Ulpa can speak decidedly as to the way in which she obtained funds for the purchase, whilst it is admitted by all, and indeed by Ulpa herself, that she was the child of poor parents, and had no stridhun when she was married. Her evidence as to the purchase is moreover distinctly opposed to that of the witnesses examined to prove her ownership. They describe how the money was taken from Ulpa's strong-box, and how the balance was made up by the pledging of her ornaments, whilst Ulpa herself owns in her written statement that her husband bought the estate, though he afterwards gave it to her, and had the title-deed made out in her name; either Ulpa or her witnesses have clearly perjured themselves. It seems to me established by the other evidence in the case that Ubotar Singh was a man of some means, a petty zemindar at the least, whilst Ulpa is admitted by all to have had nothing at all at the time of her marriage, and to have had no means afterwards of amassing a sum so considerable as the purchase-money (Rs. [illegible],200) of the mehal standing in her name. I have no doubt, after carefully going through all the evidence, that Ubotar Singh purchased the durputnee with his own money in his wife's name, and that at the time of his death, there being no direct evidence to support Ulpa's averment of gift. After marriage it formed part of his estate. The question then arises, did Ubotar Singh, by his conduct, give all the world to believe that the property was not his, but his wife's. And can the appellants, who are *bonâ-fide* purchasers without notice, be made to lose their money on account of a latent defect in their vendee's title which they could not, by any amount of care, have discovered for themselves? It appears to me that Ubotar Singh did, from first to last, give every one to understand that his wife (Ulpa Burmoneeah) was the real, as well as the nominal, owner of the estate, not only did he tell many persons who asked him about the matter that such was the case, but he made statements to the same effect in certain judicial proceedings in which he was involved, and, whenever the question was mooted, either publicly or privately, denied most positively that he had any interest in the property. I observe that not one of the witnesses, now called upon to prove his ownership, are able to give decisive opinions on the point. Some of them suppose it was Ubotar's, because he had consulted them about the purchase, others think it was Ulpa's, but all admit that the ostensible acts of ownership were performed by Ulpa, and the most they are able to say is that they do not know who was the real owner, Ubotar or Ulpa. I do not lay much stress on the fact that all public documents and all collection-papers are in Ulpa's name, because that would be equally consistent with either theory; but, so far as common report could go, it was undoubtedly published to the world that the wife, and not the husband, was the proprietor of Boalea. Then as to the documentary evidence of ownership. There is a record of a suit under Act IV. of 1840, in which Ulpa, as first party, sued for possession as against an ijaradar, who had been put in by the zemindar. The Magistrate retained the former in possession, but the Judge, on appeal, reversed his order, and gave possession to Ulpa as the durputneedar. On the 9th of July 1850, Taramonee Dassee (the putneedar) got a decree in the Collector's Court against Ulpa (the durputneedar) for rents due in Turuff Boalea, and afterwards Ulpa herself recovered from the ijaradar, set up in the Act IV. suit above noticed, the amount of his illegal collections. There is, then, the record of the suit brought by Russoo Bewah, in which Ubotar Singh was charged with cutting and carrying off a quantity of bamboos, and was, by the orders of the Magistrate, made the second party in the suit, Russoo Bewah being the first. In that case he filed a kyefeut (23rd November 1857), in which he disclaimed all liability on

the ground that Turuff Boalea belonged to his wife Ulpa, and that he had no concern with it. Again, in the case brought by Meajan Khalifa, under Act IV. of 1840, for ouster from 2½ beeghas of land, Ubotar Singh took the same course, and declared his wife to be the sole owner of the property. Ubotar Singh died in 1266 B. S., and up to that time there was, on his part, a persistent declaration both by words and action that the durputnee estate was his wife Ulpa's, and not his own.

Such declaration moreover coming from one who had no apparent object in deceiving the world by a false statement, he being admittedly in easy circumstances, and holding several other properties in his own name. It was suggested rather than directly argued that Ubotar Singh, being a jemadar in the jail at Rajshahye, was afraid of holding land situate so near the jail-buildings as that was in his own name, but it is admitted by the witnesses who give this as a reason for the benamee purchase that there was no prohibition against Government servants of Ubotar's class holding land within the district in which they were employed, and that Ubotar's dismissal from his jemadarship was not caused by his being discovered to be the real owner of the durputnee is proved by the record of the Magistrate's proceeding in the case. Ubotar Singh lost his place, not because he was the purchaser of Turuff Boalea, but because he had committed a riot on the land, and had taken with him a *posse* of jail burkundazes to make his side the stronger. If their case went no further than this, I should be inclined to hold that the appellants would be fairly entitled to the position of innocent purchasers for value without notice. The result of inquiry on their part could not have given them more precise information than that which appears on this record, and could it be said that, in the face of such direct evidence, both oral and documentary, as to the ownership of the land, that respondents were not justified in purchasing from Ulpa. But, besides the persistent statements of Ubotar Singh during his life, there is to my mind strong evidence that Kalli Churn, after Ubotar's death, assisted those statements by his own acts."

After stating what those acts were, the Judge proceeded as follows:—

"Everything was done to induce the appellants to consider Ulpa as the owner of the estate, and Kalli Churn, although he had many opportunities, never took any steps to reveal what he now states to be the true position of the parties, but corroborated, as well by his acts as by his omissions, the public avowals made by Ubotar Singh. So far as regards Kalli Churn's personal claim, therefore, I think that the lower Court's decision should be reversed, and the suit dismissed with costs. Then remains that portion which Kalli Churn sues for on behalf of his minor brother Rajcoomar Singh. And so far I think that the Principal Sudder Ameen's decision should be confirmed, for Rajcoomar occupies a very different position from that of Kalli Churn, and cannot be concluded by any statements made by Ubotar or by Ulpa. Indeed, Ubotar died long before the appellants purchased, and it is nowhere contended that they were induced to come forward by any misrepresentation on the part of the father, and by those of his mother, Rajcoomar would not be in any way bound. For, if the finding above come to, namely, that Ubotar was, at the time of his death, the real owner of the mehal, be correct, it proves Rajcoomar, as heir, would be entitled to succeed to his portion of his father's property. As regards this portion of the claim, the purchasers' only remedy would be an action against their vendor to recover such part of the purchase-money. The appellants must pay the costs on this portion of their appeal."

Macpherson, J.—"Under these circumstances, I am of opinion that, so far as the share which Kalli Churn claims in the durputnee is concerned, the decree of the lower Court ought to be reversed, and the suit ought to be dismissed with costs in proportion. For a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person. Nor will the fact that Kalli Churn attained his full age only shortly before the date of the sale avails him in any way. (See Nicholson *vs.* Hooper, 4 Mylne & Craig, p. 19[illegible] and the cases collected in White and Tudor's Leading Cases, 2nd edition, p. 20.) But as regards the share of the minor plaintiff, I think the decree of the lower Court must be confirmed. I do not think that the mere fact of Ubotar's and Ulpa's having given out that the property was the property of Ulpa alone is sufficient to prevent the minor from having his rights declared in this suit. The minor certainly is not bound by the representations made by his mother; and as Ubotar died long before the sale of the 8th Falgoon 1270, there is no evidence to show that it

as by representations made by Ubotar that he Gossains were induced to purchase. As egards the share of the minor, the decree of he lower Court is confirmed with costs in proportion."

The following are the material portion of he deed of sale: "To the ever to be emembered Ulpa Burmoneeah, wife of Ubotar Singh, of good manners, this durputee kubala is executed in the year 1262 (twelve hundred and sixty-two). I execute his kubala having concluded with you a durputnee-talook settlement according to our prayer at a rent of Rs. 1,791, and for he proper consideration of Rs. 3,200 of the whole of my rights in Boalea proper of Furuff Boalea of Dehee Boalea.

"You and your heirs shall have the power and right to alienate by sale or gift the aforesaid durputnee rights, and to grant successive under-leases thereof in putnee, keeping entire the rents, but you should give me notice of the same. And as power has been given to me to avoid and set aside the engagements of the former proprietor in my right as auction-purchaser, I make over to you the like power. But you shall not interfere with ancient lakheraj (rent-free) tenures confirmed by law, and the aforesaid debuttur (granted for the worship of idols) and burhmuttur (granted for the support of brahmins) tenures. You shall carry out whatever orders he or shall hereafter be directed, or are or shall hereafter be usual to be complied with, issued by the Civil or Criminal Court, the Collectorate, the Commissioner, the Survey, Chakbust, or the like authorities. Whatever processes shall be issued by the authorities in respect of the aforesaid mehals in my name or in that of the proprietor zemindar, you shall give me notice, accompanied with a copy thereof, and carry out the orders. Whatever information it is usual to give as regards the police you shall furnish according to law at the proper place. You shall comply with whatever orders are issued by any of the authorities, or when necessary, from my office through peons calling for any papers, and without any objection carry out the same, and give the papers. In the event of my being held answerable, or any fine being imposed on account of your default or laches in carrying out the orders of the authorities, you shall be responsible for the same. I shall have no concern therewith. You too having agreed to the aforesaid fixed rent and the above terms have voluntarily filed the kubooleut (counterpart of the lease). To this effect I execute this durputnee kubala (deed of sale), having received the full amount of the consideration-money aforesaid from your stridhun-fund, through your husband Ubotar Singh by my husband."

The following judgment of the Judicial Committee of the Privy Council was delivered by Sir Barnes Peacock:—

The appellants in this case were the defendants in the suit below. The suit was brought against them by Kalli Churn Singh on behalf of himself and as guardian of his minor brother Rajcoomar Singh, to recover certain property from the defendants, upon the ground that it had descended to the plaintiffs as the sons of Ubotar Singh, their deceased father. The defendants set up in answer to that suit that they had purchased the property from Ulpa, the wife of the father, and that that property had been bought by Ulpa out of her own stridhun. The lower Court found in favor of the plaintiffs. Upon appeal the High Court reversed the decision as to one moiety of the property, namely, the share belonging to Kalli Churn, upon the ground that he had represented that the property belonged to his mother Ulpa. It is admitted that the property was purchased under a deed of the 14th Assar 1262 from Taramonee Dassee, who was the putneedar. The purchase-money was Rs. 3,200, and it was stated in the deed of sale to Ulpa that she and her heirs should have the power and right to alienate by sale or gift the aforesaid durputnee rights, and to grant successive under-leases thereof in putnee. It also contained the following clause: "I execute this durputnee kubala, "having received the full amount of the "consideration-money aforesaid from your "stridhun-fund through your husband "Ubotar Singh by my husband." Nothing could be clearer on the face of that deed than that the property was purchased by Ulpa out of her own stridhun. The purchase being of a durputnee, a mutation of names would be effected in the serishta of the putneedar, and that mutation would be in the name of Ulpa as the owner of the property by purchase. It has been contended at the bar that Ulpa had no power to sell this property, even if it had been her own stridhun, inasmuch as it is laid down that a wife cannot sell immoveable property which has come to her from her husband as her separate property. The deed of sale, however, does not represent that the immoveable property conveyed by the deed had been given to Ulpa by her husband, but that Ulpa was the purchaser of the immoveable property by means of moveable property, namely,

the Rs. 3,200 which were her stridhun. According to the authority which has been cited by Mr. Bell from Macnaghten's Treatise on Inheritance, the Rs. 3,200 being the wife's stridhun were disposable according to the wife's pleasure. The passage from Macnaghten is at page 40. This is the passage: "It may be here observed that the Hindoo "law recognizes the absolute dominion of a "married woman over her separate and "peculiar property, except land given to her "by her husband, of which she is at liberty "to make any disposition at pleasure." Now, this deed represents that the Rs. 3,200 were her stridhun, of which, according to the authority cited, she was at liberty to make any disposition, and she did make a disposition of it by purchasing the property conveyed to her by the deed for the Rs. 3,200. If the property was purchased by her with Rs. 3,200, her own stridhun, she had a right to sell that property to the defendants, and she did sell it to them for a much larger sum than the Rs. 3,200, *viz.*, for Rs. 12,000, the actual value which the plaintiffs themselves have put upon it by the valuation of their suit. But it is said that, although the property was purchased by means of Rs. 3,200 represented to be the stridhun of Ulpa, it was not really her stridhun, but that the Rs. 3,200 were advanced by the husband, and that the property was purchased by him in the name of Ulpa. It has been found by the Court below, and also, on appeal, by the High Court, that the defendants were *bonâ-fide* purchasers of this property; that, on the face of the deed, it appeared that the property was purchased with the lady's stridhun, and that the husband, during his lifetime, had in every way, both publicly and privately, whenever he was called upon to make any representation on the subject, always represented that this was his wife's property. The defendants having purchased the property from Ulpa *bonâ fide* for a valuable consideration, and for the full value of the property, it appears to their Lordships that it would be contrary to every principle of equity that they should be turned out of the property in favor of the heirs of the husband. The High Court held that the elder of the two plaintiffs, the elder brother, was not entitled to recover his share of the property, inasmuch as he had lent himself to the representations which had been previously made by his father; and that having joined in a misrepresentation of the real state of facts, he was not at liberty to recover his share of the property, even though it might really have been the father's But the learned Judges held that the minor brother was in a different position. One of the learned Judges says: "I think that the "Principal Sudder Ameen's decision should "be confirmed, for Rajcoomar," that is, the younger brother, "occupies a very different "position from that of Kalli Churn, and can-"not be concluded by any statements made "by Ubotar," that is, the father, "or by "Ulpa. Indeed, Ubotar died long before the "appellants purchased, and it is nowhere "contended that they were induced to come "forward by any misrepresentation on the "part of the father, and by those of his "mother, Rajcoomar would not be in any "way bound." Mr. Justice Macpherson says: "I do not think that the mere fact "of Ubotar's and Ulpa's having given out "that the property was the property of Ulpa "alone is sufficient to prevent the minor "from having his rights declared in this suit. "The minor certainly is not bound by the "representations made by his mother." Now, although the minor could not be bound by the representations made by his mother, if he really inherited this property from his father, still the question is whether he was not estopped by the representations of his father in his lifetime from saying that the property was his father's, and, consequently, that it had descended to him. It is said that the misrepresentations were made by the widow when she sold the property after the father's death, but were there not misrepresentations also made by the father in his lifetime? If the property were purchased by him, and the Rs. 3,200 which were paid as the purchase-money were the property of the father, did he not represent and hold out to the world that the property was purchased out of the Rs. 3,200, which were the stridhun of his wife? That was a misrepresentation of the father, by means of which the widow after his death was enabled to sell the property. It was said that the minor would not be bound by the acts of the father before his death. Suppose the father had actually sold this property to the mother, and had made a misrepresentation by a deed of sale, would not the minor son have been bound by the deed, although the father might have had some secret understanding with the mother that it was purchased in her name benâmee for the father? It appears to their Lordships that there was a misrepresentation by the father in allowing the property to be taken by the wife under a deed of sale, representing that the purchase-money was her stridhun

d in all his acts, both public and private, ing his lifetime, representing that the perty was his wife's. After that repre-tation on the part of the father, his heirs e no more entitled to recover than the fa-r would have been in his lifetime. The rs were as much bound by the misrepre-tations made by the father as the father ld have been if the wife in his lifetime had ally sold the property to a *bonâ-fide* pur-ser. In such case the father could not e recovered the property from the pur-ser; and it appears to their Lordships the minor claiming by descent from the er is equally bound by those misrepre-tations, and that he cannot, as heir to the er, set up that that property belonged to father, when the father could not in his lifetime, under similar circumstances, set up that the property belonged to

t, then, it is contended that the plead-in this case have not raised the real tion in dispute. The suit was brought t aside an illegal deed of sale executed by defendant No. 2, the mother. It is thus d: "The properties have been left by otar Singh, deceased, the father of your itioner (plaintiff No. 1). That, on the Assar 1262 B. S., he had acquired the putnee rights of the said mehals from r putneedar, Taramonee Dassee, the e of Kashinath Shaha, for a consider-on of Rs. 3,200, and that, having then quired a lease of the same, in the name the defendant No. 2, he continued to d and enjoy them both in the Sudder d Mofussil," and that afterwards he died, that this property descended to his sons. Now the defendants had pur-ed under a deed representing that property had been purchased out of wife's stridhun. They knew nothing the real facts of the case; they stated they believed the facts to be, taking acts as they were represented at the time e purchase. They believed the deed represented that the purchase-money e wife's stridhun, and they believed the sentations which had been made by the and in his lifetime. In answer to the t, which says that the property was the and's, and that he died possessed of this erty purchased in the name of his wife, say: "Ulpa Burmoneeah acquired, ough her husband (Ubotar Singh), a dur-nee settlement of the disputed mehal m the putneedar thereof, Taramonee ssee, on payment of a bonus of Rs. 3,200 "out of her own 'stridhun' funds." They stated in their defence what they found represented upon the purchase-deed of the wife. They merely stated what they were led by the representation to believe; namely, that the property was purchased by means of the stridhun funds of the wife, and that, consequently, it did not pass to the sons upon the death of their father, but that the wife, having purchased the property out of her stridhun, was entitled to sell it. It appears, then, to their Lordships that the pleadings were sufficient to raise the question. Then the issues were raised, and they are to be found at page 138 of the record: "Is it true that Ubotar Singh, "the late father of the principal plaintiffs, "acquired the durputnee of the disputed "property in the name of the defendant No. "2 with his own funds, and remained in "possession of the same during his life-"time, or that the durputnee was obtained "by the said defendant with her own "'stridhun,' and she herself held possession "of it?" If the defendants were entitled to avail themselves of the estoppel in conse-quence of the misrepresentation of the hus-band, they are entitled to use that estoppel as matter of proof, and they use it to prove that the durputnee was not pur-chased out of the father's own property, but that it was obtained by the mother (Ulpa) with her own stridhun, and that she herself held possession of it. So they prove the is-sue on their part by means of the estoppel. The written statement is the only pleading of the defendants in this case. There is no pleading now in India by way of confession and avoidance. It was not necessary, there-fore, to plead the estoppel on the part of the heirs arising from the misrepresentation of the father. The defendants allege the facts as they find them represented in the deed which was their title-deed. They go to trial upon those facts, and they put in evidence the misrepresentations of the father and the title-deed founded upon those misrepresenta-tions as proof of their case, which was that the property was purchased out of the sepa-rate estate of the wife.

Under these circumstances, their Lord-ships are of opinion that the High Court ought to have reversed the decision of the lower Court, not only as regards the share of the elder brother, but also as to the share of Rajcoomar, and they will humbly recom-mend to Her Majesty that the decree of the High Court be reversed as to the share of Rajcoomar, that the decrees of both the

lower Courts be reversed as to the share of Rajcoomar, and as to the costs in respect of that share, and that the suit be dismissed as to that share, and that the respondents do pay to the appellants the costs in both the lower Courts calculated on the value of that share, and also the costs of this appeal, and that the said decree of the High Court be affirmed as to the share of the plaintiff Kalli Churn, and as to the costs calculated upon the valuation of that share.

Agents for the Appellants: *Messrs. Barrow* and *Barton*.

Agent for the Respondents: *Mr. Oehme*.

The 19th March 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges*.

Execution-sale—Possession—Limitation.

Case No. 728 of 1872.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 11th January 1872, reversing a decision of the Moonsiff of Manbazar, dated the 14th June 1871.

Rajah Mokoond Narain Deo (one of the Defendants), *Appellant*,

versus

Khettur Mohun Dhamat Koormee (Plaintiff), *Respondent*.

Baboos Hem Chunder Banerjee and *Umbika Churn Banerjee* for Appellant.

Baboo Kash Beharee Ghose for Respondent.

Where the zemindar in possession puts in a claim to a tenure put up for sale in execution of a decree against a party alleged to hold it under a mokurruree title, and notice of the claim is ordered to be given at the time of sale, it is unnecessary for the zemindar, who remains in full possession of his rights notwithstanding the sale, to commence a suit to set aside the sale or for any other purpose. Nor can limitation run against him in favor of the purchaser who does not obtain possession.

Markby, J.—The facts of this case are shortly these: That the plaintiff sued to recover a village which he alleged to have been held on a mokurruree title by one Madhub Narain Baboo, who got possession of it in the year 1252; that, on the 6th September 1858, the mokurruree tenure was put up to sale in execution of a decree against Madhub Narain by one Dhuroneedhur, and that the plaintiff purchased it; but it is quite clear now that the plaintiff has never obtained possession under his purchase. The defendant denies that Madhub Narain had any mokurruree tenure, but he admits that he (Madhub Narain) was in possession under a maintenance-grant as a dependant of the family; and he says that, when he came into possession of the family-property in October 1857, he resumed this land, and granted it to other persons. The present suit was brought on the 3rd September 1870; and the Moonsiff has found that the plaintiff's claim is barred by limitation. He finds upon the evidence and the documents produced that the Rajah defendant has been holding the village in dispute from 1265 up to the present time, and, therefore, without going into the merits of the case, he dismissed the plaintiff's suit. The Judicial Commissioner has overruled the decision of the Moonsiff upon the question of limitation, and then very shortly disposes of the case on the merits and holds that the mokurruree title is proved. On the question of limitation, he says in one part of his judgment that the Rajah has made a claim when this property was put up to sale by the execution-creditor of Madhub Narain, and that claim was disallowed on the 8th September 1858; and that since the present suit was preferred within 12 years from that date, it is not barred, the defendant Rajah not having, in the meantime, brought a regular suit to set aside the summary order dated 8th September 1858. It is quite clear that, at any rate, no disturbance of the Rajah's possession took place in consequence of the sale, nor is it right to say that the claim of the Rajah was disallowed; it was not allowed in this sense only that the sale was not stopped, but it was expressly directed that the notice of this claim was to be given at the time of the sale. It was therefore not necessary for the Rajah, who remained in full possession of his rights notwithstanding the sale, to commence any suit for setting aside the summary order of the 8th September 1858, or for any other purpose. The part of the judgment of the Lower Appellate Court, therefore, cannot be supported. The what we have to see is whether the judgment of the Judicial Commissioner can be supported on that which remains. All that remains of his judgment after that is where he says that, on the 17th July 1857, the decree-holder applied for the attachment and sale of the rights of Madhub Narain Baboo, which application was successful; and on that he asks how did the defendant Rajah take possession of the land which was under attach-

it in the Civil Court? Now, it may be rred from that that the Judicial Commioner thought it improbable that the ah could have taken possession, and ined the ryots to pay him rent in respect of land which was under attachment in Civil Court. There may be some improbility of this kind; but it is altogether imper to reverse the judgment of the Court rst instance upon such a ground. It was duty of the Judicial Commissioner to into the facts and evidence upon which Moonsiff based his decision. We find that he 15th October 1857, the very date on h the Rajah says he came into posses, he obtained a kubooleut in respect of property from the tenants, and that, on 5th July 1858, he gave effect to that by ering rent from them under a decree of Moonsiff's Court. It was, therefore, irreit to ask the question how he could get ssion. The facts, which the Moonsiff found, and which the Judicial Commisr does not displace, clearly show that he done so. The ground, therefore, on h the Judicial Commissioner has revers- e finding of the Moonsiff on the ques- t limitation wholly fails, and the Moon- decision stands untouched, and must be ed. The appellant is entitled to get his of this appeal and of the Lower Appel- Court.

The 28th March 1873.

Present:

Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges.*

ssions—Estoppels—Documents not on the Record—Assumptions.

Case No. 790 of 1872.

al Appeal from a decision passed by Judge of Dacca, dated the 29th bruary 1872, reversing a decision of Subordinate Judge of that District, ted the 29th June 1871.

J. P. Wise (Defendant), *Appellant,*

versus

Musst. Rubaâ Khatoon and another (Plaintiffs), *Respondents.*

C. Gregory and *Baboo Kalee Mohun Doss* for Appellant.

Baboos Romesh Chunder Mitter and *Doorga Mohun Doss* for Respondents.

Admissions made by a defendant in other suits brought by him against third parties cannot be treated as estoppels in a suit to recover possession of a different property under different circumstances.

A Judge ought not to deal with a case on documents not forming a part of the record, *e. g.*, decisions in other cases not filed in the case.

Where the first Court records its reasons as clearly and distinctly as possible, the Lower Appellate Court ought not to upset the judgment simply on an assumption such as that the tenants must have given false evidence in favor of the larger shareholder.

Mitter, J.—In this case we are of opinion that the decision of the Lower Appellate Court cannot be supported. It is admitted by the Judge in his judgment that, in the year 1857, there was an Act IV. case, the result of which was to maintain Gorrib Hossein, the party whose right, title, and interest have been purchased by the appellant in this case, in possession. The Judge goes on however to say that Gorrib Hossein having afterwards brought a suit in which he admitted that his own share in the property was 12 annas only, and the appellant also having brought a suit against certain third parties for the possession of a 4-annas share of some other properties alleged by him to be the share of Rumzan Khatoon under the *heba* of her mother, the admissions made in those two suits ought to be treated as estoppels against the appellant, and that it is, therefore, no longer open to him to say that the plaintiff's predecessor in title, namely, Rumzan Khatoon, was not entitled to a 4-annas share of the property claimed in this suit.

We are clearly of opinion that the Judge is wrong in treating the admissions above referred to as estoppels; and as this point is conceded by the pleader for the respondent, we do not wish to enter into it at any length. The suits brought by Gorrib Hossein and the appellant were dismissed, but, whether they were dismissed or not, it seems to be quite clear that the statements made by them in those suits cannot be treated as estoppels in the present suit, which is brought by the respondents to recover possession of a 4-annas share of a different property under a different state of circumstances.

The learned Judge also says: "What share of the talook Gorrib Hossein was entitled to hold at the time of the sale has not been proved in this suit, but it has been proved in the defendant's presence in other cases, and he will probably not dispute that it does not

exceed 12 annas." It is scarcely necessary for us to say that a judgment like this cannot stand. It was for the plaintiffs to prove by evidence produced in this case that they are entitled to recover the property claimed by them. We have not been able to find any of the decisions referred to by the Judge, in which he says it was proved in the defendant's presence that the share of Gorrib Hossein in the talook in question does not exceed 12 annas. No such decision has been pointed out to us by the respondent's pleader, and it seems to us quite clear that the Judge ought to have dealt with the case on the evidence on the record, and not on documents which do not form a part of it.

It has been said that the Judge has arrived at a clear finding upon the evidence on the question of possession, and that we are bound to uphold that finding as we are sitting now in special appeal. The Judge says: "It is "not surprising that the tenants should side "with the large shareholder, and I think "there is sufficient evidence of the plaintiff's "possession to prevent the hearing of the "suit being barred by limitation, and that "the plaintiffs are entitled to recover possession."

Now, after we have found from the mistakes previously pointed out by us that the Judge has dealt with this case from an entirely erroneous point of view, it is almost impossible for us to say that the Judge has arrived at a correct conclusion on the question of possession, merely because he has incidentally referred to that question at the end of his judgment. In rejecting the evidence of the plaintiff's witnesses, the Subordinate Judge who tried the case in the first instance recorded his reasons as clearly and distinctly as possible; and it was the duty of the Judge, before he came to a different conclusion, to have satisfied himself thoroughly that those reasons were erroneous, and not merely to have upset the judgment of the first Court simply on the assumption that, because the defendant is the owner of a larger share of the property in dispute, the tenants must have given false evidence in his favor.

In this view of the case, we reverse the Judge's decision, and remand the case to the Lower Appellate Court for a fresh finding, both on the question of limitation and on the merits.

We wish to add that, should the plaintiffs succeed in proving their alleged possession and dispossession, the *onus* of proving title ought to be thrown upon the defendant, appellant.

The costs will follow the result.

The 31st March 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Joinder of Causes—Special Appeal.

Case No. 735 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 15th February 1872, affirming a decision of the Moonsiff of Buxar, dated the 24th July 1871.

Sheoburt Ojha and others (Plaintiffs), *Appellants,*

versus

Judoo Ojha and others (Defendants), *Respondents.*

Mr. H. E. Mendies and *Baboo Kalee Mohun Doss* for Appellants.

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Respondents.

Certain co-sharers sued collectively a number of defendants composed partly of shareholders by a common title with the plaintiffs, and partly of parties entitled to shares by virtue of assignment from the plaintiffs. The Courts below decided the case as between plaintiffs and the original co-sharers in favor of the latter; and as between the plaintiffs and their vendees, they allowed the vendees what the plaintiffs collectively alleged to have been assigned to them. It was objected in appeal that, although correct as a whole, this was not just to certain individual plaintiffs who got less than they claimed:

HELD, that this was no ground for special appeal, but a consequence of the course which the plaintiffs had themselves adopted by suing in a body.

Phear, J.—It does not appear to us that the objection made now on special appeal to the decision of the Lower Appellate Court ought to be allowed to prevail. It seems that the plaintiffs are several in number, claiming to have been entitled originally to certain shares in the property, which is the subject of suit, and admitting that these shares have been severally diminished by assignments made to strangers. They sue collectively a considerable number of defendants who may be divided into two classes: *first*, those who are shareholders by a common title with the plaintiffs; and, *secondly*,

hose who are entitled to shares in the pro-erty by virtue of the admitted assignments om the different plaintiffs.

Both the Courts below, it seems, have ound that the original shares belonging to e plaintiffs were less than they alleged em to be; that they were, in fact, precisely hat their original co-sharers, defendants, leged them to be; and on that footing they ve decided the case as between the plaint-s and the original co-sharers, defendants.

Then as between the plaintiffs and the de-ndants who may be called the plaintiffs' ndees, the Courts below have allowed to e defendants, the vendees, precisely that hich the plaintiffs collectively alleged that ey had assigned to them.

It is now objected on special appeal that, hough this may be correct as between the aintiffs as a whole, it is not just to certain ividual plaintiffs, because the shares which e Court has, as between the original share-lders, found that some of the plaintiffs re entitled to, are really in excess of that hich is now awarded to the plaintiffs as a dy collectively. The reason of this being t the shares which fall to the other plaint-s are considerably less than they claim; d inasmuch as the whole amount assigned all the plaintiffs together has been taken t of the whole of the plaintiffs' shares, consequence has been detriment, in the y which we have mentioned, to those intiffs who, the Court finds, had the origi-shares of some substantial amount.

t does not appear to us, however, that this ground of complaint on special appeal ch we ought to uphold. It is in truth nsequence of the course which the plaint-themselves have taken. They joined as e body to sue the defendants, and must be ated as one body throughout the cause. eems to us impossible, almost, to do other-e. If, notwithstanding that they have, in way, made themselves one plaintiff, the urts were in law obliged to look at their eral interests, the result would be that re would be instead of one suit as many erent suits against all the defendants as re are individual plaintiffs. We do not k that the Court is bound, indeed we k it cannot practically take a course of kind. It may be, as Baboo Kalee hun Doss has pressed upon us, that the lt will work a great grievance to some of plaintiffs. If this be so, we dare say that may find, as between themselves and r own vendees, some way to a remedy. t, at any rate, we think they have no ground whatever of complaint as between themselves and their original co-shareholders, defendants. In short, they must abide by the consequence of the course which they have, for some reason or other, taken in grouping themselves together as one plaintiff.

We think the appeal must be dismissed with costs.

The 1st April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Decrees—Privy Council Order—Proceedings in Execution—Limitation—Act XXV. of 1852, s. 2.

Case No. 307 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 25th September 1872.

Mr. T. C. Lethbridge (Decree-holder), *Appellant,*

versus

Rajah Saheb Prohlad Sen (Judgment-debtor), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Mr. R. E. Twidale and *Baboo Taruck Nath Dutt* for Respondent.

Decrees affirmed by an order of the Privy Council must be executed with the execution of that order, and not as separate decrees.

Proceedings had in the High Court for the purpose of getting a Privy Council order sent down to the lower Court for execution, whether strictly legitimate or not, with reference to Act XXV. of 1852, s. 2, if *bona-fide* efforts made by the judgment-creditor to carry into effect that order, must be taken to be proceedings keeping the decree alive.

Phear, J.—I THINK that this appeal ought to succeed on two grounds: in the first place, the respondent has admitted that the Privy Council decree or order can be executed, as it has not been barred by lapse of time. If that be so, and inasmuch as it seems to me that the Privy Council order affirming the previous decrees must comprehend and embrace those decrees, it is somewhat incorrect to speak of executing those decrees as separate decrees, for they fall to be executed with the execution of the Privy Council order; in other words, the judgment-creditor is unquestionably entitled in executing the

decree or order of the Privy Council to get the benefit of the decrees or orders which that Privy Council decretal order affirmed. To my mind it would be almost absurd if it were otherwise.

The second ground upon which I think the appeal ought to succeed is that it seems to me that the proceedings which were had in this Court for the purpose of getting the Privy Council order sent down to the lower Court for execution must be taken as proceedings *bonâ fide* had for the purpose of keeping the decree, to which the judgment-creditor was entitled, alive. It is not necessary, I think, that we should say whether those proceedings were strictly legitimate or not. It may be or may not be that, notwithstanding section 2 of Act XXV. of 1852, the more regular and proper course for the purpose of getting the record and the copy of the Privy Council judgment into the Court which has to execute the decree is to apply for that purpose in the first instance to the High Court. In some cases I imagine that it must be necessary to take that step, inasmuch as the Court of first instance would not be able to know what was the precise decree which it ought to carry out without the instruction of the High Court.

However, as I have already said, I do not think it necessary to inquire in this case whether those proceedings were actually necessary for the judgment-creditor to take, because I think that they were *bonâ-fide* efforts made by the judgment-creditor to enforce and carry into effect the order which he had obtained from the Privy Council; they were not in any way illegal or wrong. It seems to me that he ought, at any rate, to have the benefit of them, if they save his time, notwithstanding the provisions of section 2, Act XXV. of 1852.

The order, therefore, of the Subordinate Judge ought to be varied in this respect, that it ought to order execution of the first and second decrees as well as the third decree, that of the Privy Council.

The appellant must have his costs.

Ainslie, J.—I do not feel quite sure that the admission of the judgment-debtor in this case was not made on the understanding that the period of three years' limitation does not apply to decrees or orders of Her Majesty in Council, and, therefore, I prefer resting the judgment entirely upon the second ground stated by my learned brother.

The 2nd April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Joint Decree—Execution by one Sharer—Act VIII. of 1859, s. 207.

Case No. 343 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Gya, dated the 1st October 1872.

Mussamut Amatool Russool (Decree-holder), *Appellant,*

versus

Mussamut Luteefun (Judgment-debtor), *Respondent.*

Baboo Mohesh Chunder Chowdhry and *Moonshee Abdool Baree* for Appellant.

Baboos Debendro Narain Bose and *Bood Sen Singh* for Respondent.

Where one of several persons entitled to the benefit of a decree seeks to have it executed without joining the others interested, his proper course is to apply to the Court under s. 207, Civil Procedure Code.

Phear, J.—This appeal seems to be in some degree misconceived. The appellant is one only of several persons who are on the record, and entitled to the benefit of the decree against the defendant. If he seeks to have the decree executed without joining all the persons who are interested in the decree, he should apply to the Court under section 207 of the Civil Procedure Code; and the Court will then, if it thinks fit to allow him to proceed alone, take proper measures for securing the interests of all the persons under the decree; and we think that it is the more important in this case that a step of this kind should be taken, because it appears that the defendant herself is one of the persons who are now entitled to the benefit of the decree, although her name is not, of course, on the record in the capacity of plaintiff.

The Court below appears to have acted rightly in refusing the appellant's application for execution in the shape in which he has put it.

We, therefore, dismiss this appeal with costs, pleaders' fees being assessed at two gold mohurs.

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The 2nd April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Review—Jurisdiction.

In the Matter of
Hajee Abdoollah and others, *Petitioners,*

versus

Reassut Hossein, *Opposite Party.*

Mr. R. E. Twidale and *Baboo Romesh Chunder Mitter* for Petitioners.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Opposite Party.

Every Court has so far the power to revise its own decision as may be necessary for the purpose of making in terms, accord with the intention entertained at the time it was passed, *e. g.*, to correct verbal errors, or otherwise to make the decree an accurate expression of the judgment intended. But an inferior Court of limited jurisdiction does not possess the general power of revising its own decision.

Phear, J.—We think that in this case the rule must be made absolute. The judgment of Mr. Craster in admitting the review is very short. He says —

"I think the case may be admitted to argument. As a general rule, every Court has power to review its own order, and as at present advised, I see no reason for believing that this Court has not power to review its order in the present case, although no special provision for such procedure appears to have been made in the Act under which the order was passed. I direct that the case be placed upon the review-file, and be argued."

It appears to us that the Judge has taken a erroneous view of the extent of his jurisdiction in this matter. If he were right, the consequence would be that, whereas in regular civil suits, in suits before the Collector's Court under Act X. of 1859, and in suits which are dependent upon the provisions of Act VIII. of 1869 (B. C.), the procedure for review is strictly laid down, and limited in respect to the time and the cause, yet in a summary case like the present the Court would be unrestricted in every way. It would not be obliged to confine its review to matter which was new since the former hearing, or to any of those points which are prescribed in the general Civil Procedure Code. The Judge might, in fact, in review, hear an appeal from the decision of his predecessor upon precisely the same materials as those upon which his predecessor formed his judgment; and he might do this without any limit as far as we see with regard to time; and again his own decision upon review might be reviewed thereafter equally without limit as to time. The consequence would be that we should have here a perfectly unrestricted system of appeal upon appeal without any sort of limitation. And, indeed, as far as we understand the present case, the review which has been admitted is of the nature of an appeal from the judgment of Mr. Taylor. No doubt every Court has so far the power to revise its own decision as may be necessary for the purpose of making that decision, in terms, accord with the intention of the Court entertained at the time of passing it. For instance, to correct verbal errors, or otherwise to make the formal decree an accurate expression of the judgment which the Court intended to pass. But we are of opinion that an inferior Court of limited jurisdiction does not possess the general power of revising its own decision which the Judge appears to think that every Court necessarily does possess. We may say that even the Court of Chancery in England, whose powers are as general as the powers of a Civil Court well can be, does not exercise the power of reviewing its own judgment, except when error of law is apparent on the face of the judgment, or when new matter is brought to its notice which could not have been adduced before it at the time when the decree was made.

On the whole, then, it seems to us, as we have already said, that the Zillah Courts have not got the general power of reviewing their own judgments which would be necessary in order to support the exercise of jurisdiction which the Judge here has affected to make. It follows, therefore, that the admitting of the review was in this respect *ultra vires*, and the rule setting aside the order will be made absolute with costs, which we assess at two gold mohurs.

The 3rd April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Hoondee—Signature and Endorsement—Issues.

Case No. 742 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 28th March 1872, reversing a decision of the Moonsiff of Buxar, dated the 1st September 1871.

Doolar Chand Sahoo and another (Plaintiffs), *Appellants,*

versus

Mohabeer Surun Ram and another (Defendants), *Respondents.*

Mr. G. Gregory and *Baboo Chunder Madhub Ghose* for Appellants.

Mr. M. L. Sandel and *Baboo Romesh Chunder Mitter* for Respondents.

In a suit upon a hoondee which was alleged to have been bought for a money-consideration, and to have been drawn by the first defendant in favor of the second, and endorsed by the second to the plaintiff, the first defendant denied having executed the document, or authorized his name being used, and the second defendant admitted his endorsement, but said he had made it by way of surety for the first:

HELD that it was incumbent on the lower Court to try whether the signatures were genuine, and, if it found them genuine, to distinguish the cases, and try them separately, as the defendants would, in that case, be separately liable to the plaintiff.

Phear, J.—As far as we understand this case, the plaintiff sued two defendants upon the footing of a native negotiable instrument, namely, a hoondee which he said had been bought for a money-consideration.

The hoondee was alleged to be drawn by the first defendant in favor of the second, and the second had indorsed it to the plaintiff.

On this state of the case it became incumbent on the Lower Appellate Court to try whether the signatures of the defendants were genuine signatures or not; and it is to be observed that the two defendants would, if their signatures were genuine, be separately liable to the plaintiff upon the document, and their two cases ought, therefore, to have been distinguished and tried separately.

It appears that the first defendant totally denied his liability on the document, saying, as we understand, that he had never executed it, or authorized his name being used. On the other hand, it seems that the second defendant admitted his indorsement, but said that he had made it by way of surety for the first defendant.

We cannot understand from the judgment of the Lower Appellate Court that the Subordinate Judge has dealt with the case in the aspect in which we have placed it. The Subordinate Judge has dismissed the plaintiffs' case against both defendants, but we confess that we are unable to satisfy ourselves upon what grounds he has done so with reference to either of them.

We think the case must go back to the Subordinate Judge for re-trial, and he will, in re-trying the case, consider whether the plaintiff has made out his claim against either one of the defendants or both, and he must treat the plaintiffs' claim against the several defendants as two perfectly distinct cases.

We therefore reverse the decision of the Lower Appellate Court, and send back the case for re-trial on the merits generally.

Costs will abide the event.

The 4th April 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges,*

Sale by Hindoo Widow—Reversionary Heirs—Issues—Right of Suit.

Case No. 1150 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 30th April 1872, modifying a decision of the Moonsiff of Kalegunge, dated the 22nd September 1871.

Suttyo Narain Doss and others (Defendants), *Appellants,*

versus

Ramjoy Doss and others (Plaintiffs), *Respondents.*

Baboos Bungshee Dhur Sen and *Nullit Chunder Sen* for Appellants.

Baboos Romesh Chunder Mitter and *Mohini Mohun Roy* for Respondents.

In a suit against parties claiming to be reversionary heirs for property alienated by a Hindoo widow, the Lower Appellate Court declined to enter into the questions whether the defendants were the reversionary heirs and whether the alienation was justified on the ground that the defendants might bring a separate suit, HELD that no such suit would lie, and that the Lower Appellate Court must try those issues.

Mitter, J.—WE are of opinion that the case ought to be remanded to the Lower Appellate Court for the determination of the three following points, namely, *first*, whether the defendants are the reversionary heirs of

: husband of Doya Moyee; *second*, whe- r the alienation of the property in dispute ide by Doya Moyee is valid, or, in other rds, whether it was made under such cir- nstances of necessity as would justify it der the Hindoo law; and *thirdly*, whether purchase made by Doya Moyee from ee Nath was made with her own funds, or h funds derived by her from the estate of husband. The Lower Appellate Court pears to have declined to enter into these stions upon the ground that the defend- s might bring a separate suit against the ntiffs to set aside the sale made by Doya yee. It is admitted, however, that no such t will lie, and that admission is fully ranted by a recent decision of the Privy uncil. It has been said that, as the parties o were originally made defendants in this t did not raise any objection to the plaint- t action upon the grounds contained in issues mentioned above, the appellants not entitled to have a remand upon those unds. It is clear, however, that the ob- ion was taken by the defendant Suttyo ain in his written statement; and we k that, under such circumstances, the r Courts ought to have tried those es.

e, therefore, remand this case to the er Appellate Court with directions to lay n the issues mentioned above, and then ecide them after having given reasonable rtunity to the parties to produce such ence as they have in their power to pro- e.

he costs of this appeal and of the lower rts will abide the ultimate result.

The 4th April 1873.

Present:

The Hon'ble W. Markby, *Judge.*

als to Privy Council—Estimate of Costs—Limitation.

In the Matter of

our Surn Dass and others, *Petitioners.*

Mr. R. T. Allan for Petitioners.

application for permission to appeal to the Privy l was presented on the last day of the six months d for such appeals, and with it was deposited, e sum which had been estimated as the cost of ting, printing, and transmitting the record, but imate less the charges of printing; nothing being ed as the cost of transcription. The petition cordingly refused:

HELD that petitioner had no right to amend the estimate made by the clerk of the Privy Council department, still less to amend it in the way he did; and that the plea of oversight was not sufficient to excuse him for non-compliance with the rules of Court, or to admit his application beyond the prescribed time.

Markby, J.—IN this case the petition of appeal to the Privy Council was presented on the 17th March last, the last day of the six months allowed for the presentation of the appeal. The rules of this Court made on the 30th July 1870, by Rule IV., require that, "with his petition for the admission of "the appeal, the appellant shall deposit the "sum necessary to defray the cost of trans- "lating, transcribing (or printing), and trans- "mitting the record. Such sum shall be in "respect of appeals from the appellate side of "the Court, either Rs. 2,000, or the sum "certified by the clerk of Privy Council "appeals as the probable cost of such trans- "cript, and so forth, the estimate of such cost "being prepared as directed in Rule XII."

The petitioner in this case, as I am informed by the officer of the Court, applied for a certificate of the costs of translating, printing, and transmitting the record, and was informed that the amount of such costs was Rs. 2,272. The petitioner did not deposit with his petition of appeal the sum of Rs. 2,272, but only the sum of Rs. 1,302. He arrived at that amount, as I understand his affidavit, by excluding from the estimate the charges for printing; he made no further application for an amended estimate to the clerk of Privy Council appeals, and the sum which he was ready to deposit not being the sum stated in the estimate, the officer of the Court refused to receive the petition.

On the first day the Court sat after the 17th March last, an application was made that this petition should be received, but the application could not then be entertained, because the stamp had not been obliterated in the manner which the law requires, and without which the law prohibits an application being heard. On the next day the Court sat, the application was again made and fully heard, but it had again to be returned, because the facts stated in the petition were not verified as the rules of the Court require.

The petition has now been verified, and this is the third time that the application is made. I do not allude to these circumstances as having any very material bearing on the question which I have to determine, but merely as showing the extreme carelessness with which even the most important business of this Court is sometimes conducted.

The question, it seems to me, which I have to determine is whether the petitioner has shown any good ground for not complying with the rules of the Court. Those rules being of *this* Court, I think there can be no doubt that the Court has a discretion whether or not it can dispense with any of the requirements contained in those rules, but, on the other hand, as these are the rules of the Court by which I am bound, I must hold that we have, at the same time, a right to require that these rules should be observed; and I also think that we should require that these rules should be observed unless some good cause is shown for their non-observance. Now, the petitioner puts the matter in this way, he seems to think that he has a right to take the estimate given him by the officer of the Court, and to change it from an estimate for translating, *printing*, and transmitting to an estimate for translating, *transcribing*, and transmitting, he having, in the meantime, changed his mind as to the place where he wished to have the record printed. It seems to me that, under these rules, the party had no such right. If he was dissatisfied with the estimate, he could apply to the officer to have the estimate amended, or failing that, he might apply to this Court to direct it to be amended. I do not think that he had any right to amend the estimate himself, still less had he any right to amend the estimate in the way in which he thought fit to amend it. It is obvious that, when the charges for printing are struck out, it would be necessary to substitute the charges for transcribing which are considerable. I think, therefore, that the petitioner took a wholly erroneous view of what his position is under those rules. But the question still remains whether he has shown any reasonable excuse for falling into that mistake. All that he says about it is that it was entirely by an oversight that, in making the deposit of Rs. 1,302, he omitted to provide for the charge of transcribing to which no allusion was made in the estimate. It is quite clear that no allusion to the charge of transcribing could be made in the estimate; if the record were printed here, there would be no charge for transcribing. As to its being an oversight, if it was an oversight at all, it was entirely the fault of the petitioner. It is an oversight that he could not have fallen into if he had made an application to the officer of the Court, or carefully considered the rule. It seems to me, therefore, that no ground has been made for the party's not complying with the rules of the Court. No doubt, it may appear somewhat of a hardship that, by an error of this kind, the party should lose his right of appealing to the Privy Council, but that again is entirely his own fault. Had he not delayed in the matter until the last moment of the sixth months which was given to him for presenting the petition of appeal, he could have corrected the error. It seems to me that the applicant has made out no ground why I should admit this petition of appeal. The application is therefore rejected.

The 7th April 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Small Cause Courts—High Court's Powers—24 & 25 Vic., cap. 104, s. 15—Act XI. of 1865, s. 4.

In the Matter of

Munnoo Singh, *Petitioner.*

The petitioner present in person.

The powers conferred by 24 & 25 Vic., cap. 104, s. 15, and Act XI. of 1865, s. 4, do not enable the High Court to interfere with the decision of a Court of Small Causes refusing an application on the part of a defendant to send for a copy of a letter which was filed in another suit, and which defendant desired to put in as evidence.

Markby, J.—In this case we are of opinion that the rule applied for ought not to be granted.

It seems that the defendant was sued by the Administrator-General of Bengal representing the estate of one Abraham Nicholas Pogose, deceased, for the sum of Rs. 25 deposited by the deceased with the defendant.

The defendant admits the deposit, but alleges that the whole amount, except a balance of Rs. 26, had been paid away to the deceased or by his direction.

In support of that contention he was desirous of putting in a letter addressed to an agent of the plaintiff by one Marcar Gabriel Pogose, one of the persons said to be interested in the estate of the late Abraham Nicholas Pogose.

For this purpose the defendant applied to the Judge of the Small Cause Court of Dacca, the Court in which the suit was being tried (we presume under section [illegible] of the Code of Civil Procedure) to send [illegible] a copy of that letter which had been filed in another suit.

The Judge of the Small Cause Court refused to accede to this application, and

re asked to set aside his decree against the lefendant as illegal, because of this refusal.

The provisions of the law under which we e asked to do this (there being no appeal) e section 15 of the 24 & 25 Vic., cap. 104, d section 4 of Act XI. of 1865, which give general powers of superintendence and ntrol over this Court.

We do not consider that these powers en- le us to interfere. The Judge of the Small ause Court decided with all the facts before m that the case was not one in which he ght to send for the document. Whether s decision was right or wrong we have lly no proper means of ascertaining, but is enough to say that it was upon a matter olly within his jurisdiction, and there ing no appeal, his decision is final.

The 9th April 1873.

Present:

e Hon'ble W. Markby and E. G. Birch, *Judges.*

Act VIII. (B. C.) of 1869, s. 102—Appeals.

Case No. 22 of 1873.

cellaneous Appeal from an order passed y the Officiating Judge of Dacca, dated he 2nd September 1872, reversing an rder of the Additional Moonsiff of that District, dated the 15th May 1872.

shto Coomar Chuckerbutty (one of the Judgment-debtors), *Appellant,*

versus

nund Coomar Dutt and others (Decree-holders), *Respondents.*

Baboo Huree Mohun Chuckerbutty for Appellant.

boo Sreenath Banerjee for Respondents.

e word "suit" in Act VIII. (B. C.) of 1869, s. 102, nded to cover all proceedings prior to decree and equent ones in execution.

Markby, J.—I DO not think any appeal in this case. It is admitted that, if this a suit, it would be excluded by the s of section 102, Act VIII. of 1869 gal Council), but it is said that being a eeding in execution, that section does not y. I think the word "suit" there was ded to cover all proceedings prior to ee, and subsequently in execution.

Then it is further contended that that section is altogether, so far as it restricts the right of appeal, beyond the power of the Lieutenant-Governor of Bengal in Council to enact. I think that objection equally fatal to this appeal, because the appellant has not been able to show that he has any right of appeal at all except under this very same Act. And, therefore, if this contention is well founded, there is no appeal at all to this Court. I do not wish to express any opinion that it is well founded, but I think it is sufficient to dispose of that objection to say that either way there would be no appeal.

The respondent will get his costs.

Birch, J.—I concur in thinking that no appeal lies in this case.

The 16th April 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII. of 1859, s. 284—Decree—Execution.

Case No. 25 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Moorshedabad, dated the 30th November 1872.

Kalee Doss Ghose (Decree-holder), *Appellant,*

versus

Lall Mohun Ghose (Judgment-debtor), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboos Chunder Madhub Ghose and *Tarinee Churn Ghose* for Respondent.

Act VIII. of 1859, s. 284, does not restrict the granting of a certificate, transferring a decree for execution to another Court, to cases where such decree cannot be executed within the jurisdiction of the Court whose duty it is to execute the same. A certificate may be granted upon its appearing to the latter Court that the decree could not have been completely executed by the sale of the property in its own district; but that it could be so executed by the sale of the property in the other district.

Jackson, J.—THE appellant's complaint in this case is that, upon his application to the Court executing his decree to order the sale of certain immoveable property of the judgment-debtor in zillah Moorshedabad, the

Court refused to comply with his request and ordered that he should proceed, in the first instance, against other immoveable property which had been declared equally subject to his lien, but situate in zillah Beerbhoom. It is urged that section 284 of the Civil Procedure Code does not permit the granting of a certificate transferring a decree for execution to another Court except where such decree *cannot be executed* within the jurisdiction of the Court whose duty it is to execute the same, and that it is contended means nothing other than where property cannot be found within the jurisdiction of such Court. We do not think this is the meaning of that section, and for the purposes of the present case it appears to us that a certificate might have been granted upon its appearing to the Subordinate Judge of Moorshedabad that the decree could not have been completely executed by the sale of the property in Moorshedabad, but that it could be so executed by the sale of the property in Beerbhoom. That, however, is not the question immediately before us. No certificate has been granted or applied for. All that we are concerned with at present is the refusal by the Court to sell the property in Moorshedabad. It seems to us that by so refusing the Court has only exercised the discretion reserved to it by section 284, and as far as we have been enabled to see from the circumstances of the present case, we think that the discretion has been rightly exercised. We think, therefore, that this appeal must be dismissed with costs.

The 16th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Rent-suit—Jurisdiction—Small Cause Courts.

Reference to the High Court by the Officiating Judge of the Court of Small Causes of the Suburbs of Calcutta at Sealdah, dated the 5th March 1873.

Pearee Bewah, *Plaintiff*,

versus

Nokoor Kurmokar, *Defendant*.

A suit for rent of land used for building purposes is cognizable in a Mofussil Court of Small Causes.

Case.—THE plaintiff sues to recover from the defendant Rs. 14-5-6 on account of rent for 4 cottahs of land, admitted by both parties to be used for building purposes, situated at Soora, in the Twenty-four Pergunnahs, from Bysack 1277 to Magh 1279, being two years four months and ten days, at 6 annas 6 pies a month.

Defendant pleads that the case is not cognizable by the Small Cause Court, as the suit is one for rent, which should be tried by the ordinary Civil Court.

The issue is whether or not this case, being of the nature above stated, is cognizable by my Court, being a Mofussil Small Cause Court. I am myself of opinion that the case is cognizable in a Mofussil Small Cause Court, as the rent claimed is ground-rent on account of land admitted to be "bastoo," *i.e.*, used for building purposes. The Full Bench Ruling of the High Court dated 26th June 1872, Case No. 1 of 1872, Sutherland's Weekly Reporter, Vol. XVIII., p. 234, appears to authorize the trial of such suits by the ordinary Civil Courts. But as in 17 Weekly Reporter, p. 178, a distinction is drawn between ordinary Civil Courts and Small Cause Courts, and I am not aware of any High Court Full Bench Ruling that distinction authorizes the trial of such suits, as the one in question, by a Mofussil Small Cause Court, I would solicit the High Court order upon the present case.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—It seems to the Court that it was not necessary to make this reference to it. The case in 17 Weekly Reporter, p. 178, shows that the ground of the decision there was that the suit was for enhancement of rent, and not for mere rent, and it is pointed out in the judgment that a suit for rent merely might be brought in the Small Cause Court. It is said in that judgment that the claim mentioned in section 1 Act XI. of 1865, means a claim for rent due under a contract between the parties, or a claim arising out of the occupancy of the land by the defendant, so that, ordinarily, the plaintiff would be entitled to recover rent from him.

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The 17th April 1873.

Present :

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Chittas and Maps—Evidence.

Case No. 1000 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd April 1872, reversing a decision of the Moonsiff of Bishenpore, dated the 5th June 1871.

ham Chand Ghose and another (two of the Defendants), *Appellants,*

versus

am Krishto Bewrah and others (Plaintiffs), *Respondents.*

Baboos Rash Beharee Ghose and *Nil Madhub Sen* for Appellants.

aboos Jugodanund Mookerjee and *Umerendro Nath Chatterjee* for Respondents.

Chittas and maps made in contemplation of resumption-proceedings in the presence of both sides, and signed by the parties, are legal evidence.

Markby, J.—In this case we cannot agree ith the District Judge that the chitta and ap of 1848 made in contemplation of the esumption-proceedings in the presence of oth sides, and apparently signed by the arties, are not legal evidence at all. There ay be (though we do not express any inion upon that), under the circumstances this case, grounds why no great weight ould not be attributed to them; but we ink that the Judge of the Lower Appellate ourt must consider them, and attach such ight to them as he thinks proper. We o think from what we have seen that there another document alluded to, namely, the cision of the Deputy Collector of the 11th ugust 1855, which requires some considera- n in order to ascertain what really was cided on that occasion. We wish to repeat at we do not, in the least, desire to express y sort of opinion how this case should be timately decided. We only desire to point t that, in order to come to a satisfactory nclusion, there should be a further investi- tion; and all those papers which are on the cord must be carefully considered.

The result is that the decision of the District Judge will be set aside, and the case remanded to him for re-trial. Costs of remand will abide the ultimate result.

The 17th April 1873.

Present :

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Municipal Commissioners—Act III. of 1864, ss. 6 and 79—Oaths—Evidence—Burning-ghats—Jurisdiction of Civil Courts.

Case No. 436 of 1872.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 18th September 1871, affirming a decision of the Moonsiff of Serampore, dated the 3rd May 1871.

Brindabun Chunder Roy and others (Plaintiffs), *Appellants,*

versus

The Chairman and Vice-Chairman of the Municipal Commissioners of the Town of Serampore (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose for Appellants.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

Every Municipal Commissioner being vested, by Act III. of 1864, s. 6, with the powers of a Magistrate under s. 23 of the Criminal Procedure Code, is authorized to administer an oath, if the purposes of the Act require that he should do so.

A proceeding, taken under Act III. of 1864, s. 79, is not a judicial proceeding, and the "evidence" referred to therein means evidence without oath. Regular reports signed by medical men would constitute evidence within the meaning of that section.

S. 79 does not authorize Municipal Commissioners to close a burning-ground which has been used for very many years, merely because they think that the burning of dead bodies is offensive. It allows them to interfere only when it shall appear to them upon the evidence of com petent persons that any burning-ghat or burying-ground is in such a state as to be dangerous to the health of persons living in the neighbourhood thereof.

Municipal as well as other public boards are included within the restraining and regulating jurisdiction of the Civil Courts of the country which are competent to inquire into and control the action of public bodies where they have acted in excess or contravention of the powers conferred upon them.

Markby, J.—This suit was brought by Brindabun Chunder Roy and 56 other persons, inhabitants of Serampore and Chatra, against the defendants, who are the Chairman

and Vice-Chairman of the Municipal Commissioners of the town of Serampore, asking for a decree maintaining and declaring their right to burn dead human bodies at a ghat, known as Kalee Baboo's ghat, which the plaintiffs state to have been used as a burning-ghat for about 200 years, but which, on the 15th September 1870, the defendant, Mr. Hopkins, the Vice-Chairman of the Municipal Commissioners, ordered to be closed.

The defendants in their written statement objected, *first*, that no notice of suit had been served as required by section 87 of Act III. of 1864; and, *secondly*, that the suit was barred by the limitation prescribed in that section; and failing these objections, they alleged that the ghat had been closed under the provisions of section 79 of the last-mentioned Act.

In their written statement, the proceedings which were taken by the Municipal Commissioners for closing the ghat are thus stated: "On the 22nd March 1864 the Brigadier-General of Barrackpore forwarded his complaint to the Deputy Magistrate of Serampore regarding the nuisance occasioned by the burning-ghat opposite to Barrackpore cantonment. Accordingly, depositions of several officers and gentlemen, and that of several professed medical men, were taken into consideration; and after the selection of a suitable burning-ghat so as to cause no nuisance to the inhabited portion as well as to Barrackpore cantonment, a report on the subject was made to His Honor the Lieutenant-Governor of Bengal for the removal of the burning-ghat. The reply from Government was received to the effect that the ghat was to be removed, *vide* accompanying Government letter No. 4006 (Exhibit No. 1) and *Calcutta Gazette* (Exhibit No. 2); subsequent to the Government sanction having been obtained, a notice was affixed on a conspicuous part of the ghat for closing it, which, if required, may be proved by evidence and production of the copy-book of notices (Exhibit No. 3) kept in this office."

"The accompanying copies of evidence of Dr. J. Sutherland, M. D., Deputy Inspector-General of Hospitals, Barrackpore, Dr. R. F. Thompson, Civil Assistant Surgeon, Hooghly, and Baboo Dwarkanath Chatterjee, Sub-Assistant Surgeon, Serampore (Exhibits 4, 5, and 6), taken down in the case, and authenticated by the Vice-Chairman, which, I think, is admissible under Act II. of 1852, will prove the evidence of competent persons, as the provisions of section 79 of Act III. of 1864 requires, taken down before the closing of the ghat was ordered."

Somewhat indefinite issues were raised upon these allegations, but the result was that the Moonsiff held that the suit was brought within time, but that the notice of suit was insufficient. He also held that the burning-ghat had been closed in accordance with the provisions of section 79 of Act III. of 1864; and he dismissed the suit.

On appeal the Additional Judge held that the notice of suit was sufficient, but he also in effect finds that the ghat had been legally closed under the provisions of the Act; and he dismissed the appeal.

The plaintiffs have appealed, and it is contended in special appeal that this decision of the Additional Judge is wrong in point of law, and that the proceedings of the Municipal Commissioners were illegal and void for two reasons: *First*, because the order was made upon three reports, which not being on oath or affirmation were not "evidence" as required by the Act; and, *secondly*, because these reports, even if they are "evidence," do not, as the Act requires, show that this burning-ghat is in such a state as to be dangerous to the health of persons living in its neighbourhood.

The documents, which the Municipal Commissioners appear to have had before them, and which they treated as evidence, were three certificates, which are as follow:—

(1). "I, John Sutherland, M. D., Officiating Deputy Inspector-General of Hospitals, Barrackpore Circle, do hereby declare that the burning of the dead bodies on the Serampore side of the river Hooghly opposite, or nearly opposite, the houses of European residents at Barrackpore is regarded by myself and other residents of this part of the station as a disgusting and loathsome nuisance. It was recently found necessary to shut all the doors on the river side of my own and, I believe, other houses to exclude the disgusting stench from dead bodies undergoing cremation.

"The influence of such burning on the health of the residents at Barrackpore cannot easily be estimated, but I have no hesitation in stating that I regard the *burning of dead bodies* near to, and to windward of, the station as hurtful; and that in my opinion, the offensive gaseous emanations resulting from the action of fire on human bodies are injurious to the health of the persons within their influence."

(2). "I, R. F. Thompson, Civil Assistant "Surgeon of Hooghly, do hereby sincerely "declare that the *burning of dead bodies* "on the Serampore side of the river Hooghly "is, in my opinion, not only highly prejudi- "cial to the health of the people in its "locality, but also to the residents on the "opposite side of the river at Barrackpore."

(3). "I, Dwarkanath Chatterjee, Sub- "Assistant Surgeon, Officiating Medical "Officer of Serampore, do hereby declare "that I consider the existence of so many "burning-ghats along the Serampore and "Chatra banks of the river as a great "nuisance, and that I believe one place for "the cremation of the dead at a convenient "distance, and fenced on three sides by "*pucka* walls, will be an improvement on "the present sanitary condition of the "town."

The contention of the appellants is, that these documents are not "evidence," because the word "evidence" imports that the statement should be made under the sanction of an oath or some form of affirmation equivalent thereto as is required when evidence is taken in a Court of Justice.

The Additional Judge has said as to this, that, "as the Municipal Commissioners had "no power to take evidence on oath on "matters of this kind, the word 'evidence' "most clearly means evidence without oath."

Possibly, if the fact was so, and the Municipal Commissioners had no power to administer an oath, the inference would be correct; but I do not see why it is said that they have no such power. By section 6 every Commissioner, for the purposes of this Act, is vested with the powers of a Magistrate under section 23 of the Code of Criminal Procedure, and this would seem to be sufficient to authorize him to administer an oath, if the purposes of the Act require that he should do so. We must, therefore, consider the meaning to be attributed in this clause of the Act to the word "evidence," which appears to me to depend upon whether or no the proceeding to be taken under this section is, or is not, a judicial proceeding. If it is, then, upon the principle upon which the case in the 12th Weekly Reporter, page 50, Criminal Rulings, appears to have been decided by the Full Bench, the evidence must be taken on oath. If it is not, then I think the Municipal Commissioners might act upon these reports if they deemed them to be trustworthy. It seems to me that this is not a judicial proceeding. No provision is made for enabling any person, as of right, to appear and show cause against the order which the Municipal Commissioners may be about to make, or even for any notice being given as to the intention of the Municipal Commissioners to take steps to close the ghat or burial-ground. No certificate or formal decision of any kind is required. And though it is true that the acts of the Municipal Commissioners under the section may interfere with private rights which are highly valued, and though it would, in my opinion, be wise and prudent that they should give to their proceedings the utmost publicity, and give to the persons interested an opportunity of being heard, yet, when the Act does not require any of the other usual formalities of a judicial proceeding, I do not think the single requirement of an oath or affirmation was intended to be retained. Of course, I do not mean that the answer to a casual inquiry, even by a competent person, would be evidence which the Municipal Commissioners could act upon. But I think regular reports, signed by medical men, constitute the evidence of competent persons within the meaning of the Act.

With regard to the other objection, that even if a report not on oath can be treated as evidence, still these reports do not constitute any evidence that this ghat is in a state dangerous to the health of persons residing in the neighbourhood, it is obvious that there cannot be any consideration in the present suit of the sufficiency of the information upon which the Municipal Commissioners acted. The only thing that could be considered in this suit is whether there were before the Municipal Commissioners any materials upon which they could, and upon which they did, come to the conclusion that this ghat was in such a state as to be dangerous to the health of persons living in the neighbourhood. It is contended that there were not, because these reports show nothing whatsoever as to the state of this particular ghat, and could not possibly, upon any construction of them whatsoever, lead to the conclusion that this burning-ghat was in such a state as to be dangerous to health. At any rate, if that is not precisely what is contended, that is what the plaintiffs must establish before the order of the Municipal Commissioners can be questioned. It was assumed by the appellants that the three reports above set out were the only evidence before the Municipal Commissioners, and the argument of the respondents has proceeded throughout upon the same assump-

tion; and of course the evidence taken at this trial can only affect the question now before us as showing what the proceedings of the Municipal Commissioners really were. We have, therefore, to consider what these three reports amount to; and they certainly do appear to me to show nothing whatever as to the state of this ghat. In fact, these reports, as well as the inquiry, seem to me to be addressed throughout to the wrong question; the question under the Act is not as to the practice of burning or burying dead bodies, but as to the state of the locality where the burning or burying takes place. If the burial-place is so surcharged, or from imperfect burning or some other reason there is such an accumulation of that which is noxious in a burning-ghat as to be dangerous to the health of persons living in the neighbourhood, then, after providing another suitable place, the burial-ground or burning-ghat, which is in this objectionable state, may be closed. But there is no power to interfere with the practice of burying or burning so long as the burial-ground or burning-ghat is not itself in a noxious condition.

This is analogous to the provisions of the Public Health Act in England, where a similar power is given to close a burial-ground, but only in case it should be found to be in a state dangerous to health by reason of its being surcharged (see 11 & 12 Vic., c. 63, s. 82).

In a case where no formal proceeding of any kind has taken place, it is not very easy to ascertain exactly what has been done; and we ought not to declare the proceedings of a body having important public functions to perform to be void, unless it is quite clear that they have failed to comply with the provisions of the law. But it appears, I think, from all the evidence, that the Municipal Commissioners have throughout misunderstood their powers under this section. The matter appears to have originated in a complaint of the officer commanding at Barrackpore, who of course could not be affected by the state of the ghat, but only by the practice of burning; and to this point the attention of the Municipal Commissioners seems to have been directed throughout. This appears very clearly from the deposition of the Vice-Chairman Mr. Ryland, who conducted these proceedings. He appears to have had the evidence of his own senses that the stench caused by burning was highly disagreeable. But when, in company with one of the medical men, he inspected the ghat, he says: "I did not then smell anything, inasmuch as there was no body burning." This I think shows the light in which the matter was considered by the Municipal Commissioners, and I think it is impossible upon the three reports upon which they acted to carry the matter further than that, in the opinion of these three gentlemen, the practice of burning dead bodies *anywhere*, is prejudicial to the health of persons living anywhere in the neighbourhood. In fact, these three reports would apply just as well to any other burning-ghat in Serampore which the Municipal Commissioners wished to close as to the one which is the subject of this suit; and if we hold the proceeding of the Municipal Commissioners in this case to be valid, we shall, in effect, hold that they have power under this Act to prohibit intra-mural burning and burying altogether.

It appears to me, therefore, that we are bound to hold that there was not before the Municipal Commissioners any evidence of such a nature as the Act requires, and that their proceedings under section 79 were, therefore, invalid.

The defendants have, however, now taken for the first time, an objection that no such suit as the present will lie. They did not raise this question in either of the Courts below, but they now contend that this Court has no jurisdiction to interfere with the action of a public body; that no person can maintain a suit for the mere declaration of a public right, but can only maintain an action for damages when he has himself suffered some injury.

There being absolutely nothing analogous to the position of the parties in this suit under the Hindoo law, and the institution of a body of Municipal Commissioners with large sanitary powers being a purely European institution, we are compelled to look for analogy in the law of England, where such an institution is well known and established. Now the general jurisdiction of Courts of Law in England, to inquire into and control the action of public bodies when they have acted in excess or contravention of the powers conferred upon them, is undoubted. I need only cite as an example the observation of Lord Justice Turner in Biddulph v. The St. George's Vestry, 33 L. J., Ch., p. 417, where, though, in that case the learned Judge thought the Court ought not to interfere, he takes care to say: "Now I am very far from thinking that the "Court has not power to interfere with public "bodies in the exercise of powers which are "conferred on them by Act of Parliament

The 2nd April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Review—Jurisdiction.

In the Matter of

Hajee Abdoollah and others, *Petitioners,*

versus

Reassut Hossein, *Opposite Party.*

Mr. R. E. Twidale and *Baboo Romesh Chunder Mitter* for Petitioners.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Opposite Party.

Every Court has so far the power to revise its own ision as may be necessary for the purpose of making in terms, accord with the intention entertained at the n it was passed, *e. g.*, to correct verbal errors, or other- to make the decree an accurate expression of the ment intended. But an inferior Court of limited diction does not possess the general power of revising own decision.

Phear, J.—We think that in this case the e must be made absolute. The judg- nt of Mr. Craster in admitting the re- w is very short. He says —

"I think the case may be admitted to argu- ent. As a general rule, every Court has ower to review its own order, and as at resent advised, I see no reason for believing at this Court has not power to review its rder in the present case, although no spe- ial provision for such procedure appears have been made in the Act under which e order was passed. I direct that the se be placed upon the review-file, and be rgued."

It appears to us that the Judge has taken erroneous view of the extent of his juris- tion in this matter. If he were right, the sequence would be that, whereas in regu- civil suits, in suits before the Collector's urt under Act X. of 1859, and in suits ich are dependent upon the provisions of t VIII. of 1869 (B. C.), the procedure for iew is strictly laid down, and limited in pect to the time and the cause, yet in a mmary case like the present the Court uld be unrestricted in every way. It uld not be obliged to confine its review matter which was new since the former aring, or to any of those points which are scribed in the general Civil Procedure de. The Judge might, in fact, in review, ar an appeal from the decision of his pre- cessor upon precisely the same materials as those upon which his predecessor formed his judgment; and he might do this without any limit as far as we see with regard to time; and again his own decision upon review might be reviewed thereafter equally without limit as to time. The consequence would be that we should have here a perfectly unrestricted system of appeal upon appeal without any sort of limitation. And, indeed, as far as we understand the present case, the review which has been admitted is of the nature of an appeal from the judgment of Mr. Taylor. No doubt every Court has so far the power to revise its own decision as may be necessary for the purpose of making that decision, in terms, accord with the intention of the Court entertained at the time of passing it. For instance, to correct verbal errors, or otherwise to make the formal decree an accurate expression of the judgment which the Court intended to pass. But we are of opinion that an inferior Court of limited jurisdiction does not possess the general power of revising its own decision which the Judge appears to think that every Court necessarily does possess. We may say that even the Court of Chancery in England, whose powers are as general as the powers of a Civil Court well can be, does not exercise the power of reviewing its own judgment, except when error of law is apparent on the face of the judgment, or when new matter is brought to its notice which could not have been adduced before it at the time when the decree was made.

On the whole, then, it seems to us, as we have already said, that the Zillah Courts have not got the general power of reviewing their own judgments which would be necessary in order to support the exercise of jurisdiction which the Judge here has affected to make. It follows, therefore, that the admitting of the review was in this respect *ultra vires*, and the rule setting aside the order will be made absolute with costs, which we assess at two gold mohurs.

The 3rd April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Hoondee—Signature and Endorsement—Issues.

Case No. 742 of 1872.

Municipal Commissioners under which this burning-ghât was closed was illegal; and that the plaintiffs have a right to burn dead bodies at this ghât, the order of the Municipal Commissioners notwithstanding.

Birch, J.—It is difficult to ascertain from the record what steps were taken by the Vice-Chairman of the Municipality before he ordered this burning-ghât to be closed. There seems to have been nothing analogous to a judicial proceeding. No notice was served on the proprietor of the ghât, no opportunity was offered to him of showing that there was nothing in the state of the ghât to warrant the interference of the Municipal Commissioners. No complaint appears to have been preferred by any of the persons residing near the ghât. The Officer Commanding at Barrackpore, on the opposite side of the river, appears to have been the first to complain of the burning of bodies at this ghât as a "nuisance." The ghât had been used for a great many years (the plaintiffs say 200) for cremation, and no complaints appear to have been made by the residents of Barrackpore in previous years. Early in 1864 the ghât was suddenly closed by the Deputy Magistrate, but his proceedings were quashed upon their being brought to the notice of this Court. The Court remarked that "proceedings taken with a view to stop "such a long-standing practice must be "conducted strictly according to the law, and "evidence should be taken as to the character "and effect of the nuisance of which complaint "is made." Shortly after this, the Municipal Act was extended to Serampore, and early in 1866 the Municipal Commissioners appear to have determined to prevent the burning of bodies at this and other ghâts. The Deputy Inspector-General of Hospitals, on the 9th April 1866, sent to the Commissioners a written declaration, that the burning of dead bodies on the Serampore side of the river, nearly opposite the houses of the European residents at Barrackpore, was regarded by himself and other residents at that part of the station as a "disgusting and loathsome nuisance," and was, in his opinion, hurtful and injurious to the health of persons within the influence of the gaseous emanations resulting from the action of fire on human bodies. This document, and the certificates of the Civil Surgeon of Hooghly and the Sub-Assistant Surgeon of Serampore, only go to show that, in the opinion of these gentlemen, the burning of dead bodies on the Serampore side of the river is a nuisance and prejudicial to the health of people residing near the ghât, and on the other side of the river opposite thereto. There is nothing in any of these opinions as to the state of this particular burning-ghât. In 1868, the Vice-Chairman of the Municipality appears to have taken action on these documents, and to have reported that the ghât was deemed dangerous to the health of persons living in the neighbourhood. In due course, the sanction of the Local Government was obtained to the closing of the burning-ground, and an order prohibiting cremation was affixed on the spot on the 24th June 1869. The proprietor of the ghât, on the 24th August following, submitted to the Vice-Chairman a carefully-worded protest against the order of prohibition, and prayed for a reconsideration of the order and reference to higher authorities. This application was not attended to, and the parties aggrieved by the order were compelled to resort to the Civil Court.

The defendant, the Vice-Chairman, contends that he had lawful power to prohibit the burning of dead bodies at this burning ground, and cites section 79, Act III. of 1864, as his warrant for what he has done. That section does not authorize Municipal Commissioners to close a burning-ground which has been used for very many years merely because they think that the burning of dead bodies is offensive. It allows them to interfere only when it shall appear to them, upon the evidence of competent persons, that any burning-ground is in such a state as to be dangerous to the health of persons living in the neighbourhood thereof. The condition precedent to their taking action under the law from which they derive their authority is wanting in this case. The Vice-Chairman had before him no evidence as to the state of this burning-ground. Assuming that the reports of the medical officers submitted were evidence, they say nothing as to the state of this burning-ground, and the Vice-Chairman was clearly in error in reporting to the Commissioners that the burning-ground had been "deemed, in the opinion of the medical officers consulted, to be dangerous to the health of persons living in the neighbourhood." The defendant's plea that the action of the Municipal Commissioners cannot be questioned in the Civil Court is one which I cannot allow. The right to compensation contemplated in section 87 of the Act as accruing to persons sustaining injury from the exercise of their statutory powers by Municipal Commissioners is not the only relief. The restraining and regulating jurisdiction of the Civil Courts of

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ountry extends to Municipal as well as her public Boards. It would be dangerous leave the power conferred on Municipal ommissioners free of all control, and it is the Civil Court to determine whether the ommissioners have acted in excess of the tutory powers entrusted to them. merous cases might be found in the glish Reports showing how the Courts of w interfere to restrain public Boards and mmissioners from acting in excess of their tutory powers. If they exceed those wers, their orders are *ultra vires*, and will be aside. The same principle must guide in disposing of this case. It is probably first of its kind that has come before the urts in this country, and it has been carely considered. The argument that has n urged before us on the part of the dedants has been similar to that used in the e of Tinkler *vs.* Wandsworth Board of rks, DeG. & J., Vol. II., p. 261; there was argued, on behalf of the defendts, that the Board were the proper judges of state of a particular property upon which y found what they considered a nuisance, were the proper persons to prescribe the edy, and it was further contended that lic bodies, while acting within their tory power, could not be interfered with the Courts, on the ground that they are exercising a sound discretion in their ceedings. It was held by the Court of ncery that the Board of Works had eded their statutory powers and had acted *a vires*.

ord Justice Turner's judgment cones with these words, which are as applile to the Municipal Commissioners of mpore as they were to the Wandsworth rd of Works: "It may be as well aution these defendants that, entrusted hey are with very extensive powers, it eir bounden duty to keep strictly within e powers, and not to be guided by any ied view of the spirit of the Act which ers them."

arning-grounds must, according to the om of the country, be allowed. Munici-Commissioners have full powers to ensure they are kept in proper condition, but are not authorized to close them except er the circumstances set forth in section 79, III. of 1864. I consider that the defend-has exceeded his statutory powers in g as he has done, and I concur with my ned colleague in holding that the burning-nd was illegally closed, and that the illegal must be declared null and void.

The 15th March 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mahomedan Law—Dower (prompt or deferred) —Certificate of Administration—Act XXVII. of 1860.

On Appeal from the High Court of Oudh.

Mirza Bedar Bukht Mohummed Ali Bahadoor

versus

Mirza Khurrum Bukht Yahya Ali Khan Bahadoor.

The appellant, one of the royal family of Oudh, sued his father, the respondent, for Rs. 50,000 as his share of the dower alleged to have been settled on his mother, the late Oomrao Begum, who left as her heirs her husband (the appellant), her only son, and three daughters, who were made joint defendants. The plaintiff's case was that the dower being unpaid, he as co-heir became entitled to three-tenths; but having regard to the circumstances of the husband, he had limited his claim. The respondent disputed the genuineness of the kabinnama and the amount of the alleged dower, pleading that, whatever was its amount, it had been satisfied during the lifetime of Oomrao Begum. The first Court decreed the suit, but the Lower Appellate Court holding that the defendant had established his plea of satisfaction, reversed the decision:

HELD that the mehrnama was a genuine document, and that the dower was of the amount alleged by the plaintiff subject to modification according to the law and practice in Oudh; but that as plaintiff had taken out no certificate under Act XXVII. of 1860, s. 3, the cause should be remitted to the Judicial Commissioner to have it ascertained what amount of dower was payable by the respondent to the estate of his deceased wife, and what, after payment of debts, was the share of dower due to each co-sharer.

Where it is not expressed whether the payment of the dower is to be prompt or deferred, the rule is to regard the whole as due on demand.

Quære.—Where no time for the payment of deferred dower is expressly limited by contract, must it be presumed to be payable on the death of either husband or wife, or only on the death of the husband?

THIS is an appeal from a decree of the Judicial Commissioner of Oudh, which dismissed the suit of the appellant, thereby reversing the decree which had been made in his favor by the Civil Judge of Lucknow.

The suit was brought by the appellant to recover from his father, the respondent, the sum of Rs. 50,000 as his share of the dower alleged to have been settled on his mother, the late Oomrao Begum. His case was that his parents inter-married in December 1831; that the lady's mehr, or dower, was then fixed at the sum of nine lakhs of sicca rupees; that the contract for the payment of that sum was on the occasion of the marriage, or shortly afterwards, embodied in

the kabinnama annexed to the plaint, and set forth at page 3 of the record; that Oomrao Begum died in January 1868, leaving as her heirs, according to Mahomedan law, her husband, the appellant, her only son, and three daughters, who were made joint defendants to the suit; that the dower being unpaid, the appellant as such co-heir thereupon became entitled to three-tenths of it; but that, in deference to the law which prevails in Oudh, by which the Courts of Justice are empowered to reduce extravagant dowers to such an amount as, having regard to the circumstances of the husband, they may deem reasonable, he had limited his claim to Rs. 50,000.

The parties are of the Royal family of Oudh. The respondent's father, Muhammed Ali, at the date of the marriage, was uncle to the then reigning king, but in 1837 he succeeded to the throne, and, dying in 1842, was succeeded by the respondent's elder brother, the late Amjud Ali, who was the father of Wajid Ali, the living ex-king.

The case of the respondent was that the kabinnama produced was not genuine; that the stipulated dower was not nine lakhs of rupees, but a much smaller sum, possibly not exceeding the fatima dower of 500 dirhems; but that whatever was its amount, it had been satisfied in the lifetime of Oomrao Begum, and during the reign of Muhammed Ali Shah, by the payment of Rs. 7,000 and the gift of a pair of armlets valued at Rs. 3,000. Other objections were also taken to the suit, which will be afterwards considered.

The issues originally settled were:—

1. Whether the plaintiff could maintain his suit without producing a certificate under the provisions of Act XXVII. of 1860, section 3, as one of the heirs of his mother.

2. Whether the kabinnama produced was genuine or not.

3. Whether the stamp was sufficient.

4. Whether the defendant had paid, and his wife accepted, the sum of Rs. 10,000 in lieu of her claim to dower.

5. What was the extent and value of the plaintiff's share.

Two other issues were afterwards added, *viz.*, whether the respondent was a minor at the date of his marriage; and, if so, whether that fact would invalidate the deed of dower according to Mahomedan law.

The two latter issues, and the second of the original issues, were submitted to a jury chosen by consent of both parties, and were found in favor of the plaintiff. But exception was afterwards taken to the regularity of this proceeding, and their Lordships will therefore treat the case as if there had been no regular finding of a jury on these points. The final result of the trial, however, in the Court of first instance, was that the Judge found all the issues in favor of the plaintiff. On appeal, the Judicial Commissioner, confining himself almost entirely to the second and fourth of the original issues, concurred with the Civil Judge in his finding on the former; but, upon the latter, held that the defendant had established his plea of satisfaction, and therefore dismissed the suit.

Other points have been raised by Mr. Bell at the bar, which will be afterwards considered; but their Lordships will deal, in the first instance, with the two material issues which have just been mentioned. They can see no ground for disturbing the concurrent judgments of the two Courts upon the first of them. It is no doubt true that the document relied upon did not come from that which would at first sight appear to be the proper place of custody, *viz.*, the Dufterkhana of Oomrao Begum. The admitted facts concerning its production are that, on the death of Oomrao Begum, and when some question had arisen touching her missing mehrnama, Nawab Moomtaz Mahal, the widow of a former King of Oudh, went to the house of the deceased lady, and, in the presence of both the appellant and respondent, and also of other persons, produced a tin cylinder, which she said she had received from Oomrao Begum some three years before; that on opening the cylinder, this document, with another, was found in it; and that with the father's assent, it remained in the possession of the son. The evidence as to the father's behaviour on this occasion will be considered hereafter when their Lordships come to deal with the other issue. Mr. Bell has commented strongly on the omission of the appellant to prove by his own deposition, or otherwise, the identity of the document annexed to the plaint with that produced by Moomtaz Mahal. But that fact seems not to have been questioned in the Court below. The question of course remains whether the document so produced had really been delivered by Oomrao Begum to Moomtaz Mahal; and, if so, whether it was what it purports to be, the mehrnamah executed upon or shortly after her marriage. There is little, if any, evidence on this point except that of Moomtaz Mahal herself. She states that, when intending to go on a pilgrimage

asked to set aside his decree against the ndant as illegal, because of this refusal.

he provisions of the law under which we asked to do this (there being no appeal) ection 15 of the 24 & 25 Vic., cap. 104, section 4 of Act XI. of 1865, which give eneral powers of superintendence and rol over this Court.

e do not consider that these powers en- us to interfere. The Judge of the Small e Court decided with all the facts before that the case was not one in which he t to send for the document. Whether decision was right or wrong we have no proper means of ascertaining, but enough to say that it was upon a matter y within his jurisdiction, and there no appeal, his decision is final.

The 9th April 1873.

Present:

Hon'ble W. Markby and E. G. Birch, *Judges.*

VIII. (B. C.) of 1869, s. 102—Appeals.

Case No. 22 of 1873.

llaneous Appeal from an order passed the Officiating Judge of Dacca, dated 2nd September 1872, reversing an er of the Additional Moonsiff of that trict, dated the 15th May 1872.

to Coomar Chuckerbutty (one of the Judgment-debtors), *Appellant,*

versus

nd Coomar Dutt and others (Decree-holders), *Respondents.*

aboo Huree Mohun Chuckerbutty for Appellant.

oo Sreenath Banerjee for Respondents.

word "suit" in Act VIII. (B. C.) of 1869, s. 102, ded to cover all proceedings prior to decree and uent ones in execution.

rkby, J.—I DO not think any appeal this case. It is admitted that, if this a suit, it would be excluded by the of section 102, Act VIII. of 1869 al Council), but it is said that being a ding in execution, that section does not . I think the word "suit" there was ed to cover all proceedings prior to e, and subsequently in execution.

Then it is further contended that that section is altogether, so far as it restricts the right of appeal, beyond the power of the Lieutenant-Governor of Bengal in Council to enact. I think that objection equally fatal to this appeal, because the appellant has not been able to show that he has any right of appeal at all except under this very same Act. And, therefore, if this contention is well founded, there is no appeal at all to this Court. I do not wish to express any opinion that it is well founded, but I think it is sufficient to dispose of that objection to say that either way there would be no appeal.

The respondent will get his costs.

Birch, J.—I concur in thinking that no appeal lies in this case.

The 16th April 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII. of 1859, s. 284—Decree—Execution.

Case No. 25 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Moorshedabad, dated the 30th November 1872.

Kalee Doss Ghose (Decree-holder), *Appellant,*

versus

Lall Mohun Ghose (Judgment-debtor), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboos Chunder Madhub Ghose and *Tarinee Churn Ghose* for Respondent.

Act VIII. of 1859, s. 284, does not restrict the granting of a certificate, transferring a decree for execution to another Court, to cases where such decree cannot be executed within the jurisdiction of the Court whose duty it is to execute the same. A certificate may be granted upon its appearing to the latter Court that the decree could not have been completely executed by the sale of the property in its own district; but that it could be so executed by the sale of the property in the other district.

Jackson, J.—THE appellant's complaint in this case is that, upon his application to the Court executing his decree to order the sale of certain immoveable property of the judgment-debtor in zillah Moorshedabad, the

have been the document now proved to be the real mehrnama, which, upon the evidence, their Lordships believe to have remained for years afterwards in the possession of Oomrao Begum, and to have been sent by her to Moomtaz Mahal. And in this conclusion their Lordships are confirmed by the account which the witnesses, including the respondent himself, give of his behaviour on the occasion of the production of the document by Moomtaz Mahal. A question had then arisen touching his liability for the dower. Is it credible that when the missing document was produced, he should merely have said I am "burree" (free) from its obligations, and allowed it without remonstrance to pass into the hands of the party interested in enforcing it? Is it credible that, if his story were true, he should not have said "this is not the genuine mehrnama; or, if genuine, it must have been fraudulently obtained from my darogah, to whose custody I committed it?"

It need hardly be observed that the case which this weak and inconsistent evidence is produced to establish is one that involves startling improbabilities. It must now be taken to be an established fact that the stipulated amount of dower was nine lakhs of rupees. One reason for fixing these excessive dowers is notoriously the desire to protect the woman from capricious repudiation. It is in the highest degree improbable that Oomrao Begum should, within ten years of her marriage, relinquish that protection for so small a sum as Rs. 10,000. On the other hand, if the money and jewels really passed from the husband to the wife, their amount and value are not so large as to be inconsistent with the hypothesis that they were a free gift from the son of a reigning king to his wife. And if not a gift, the transaction may have been in the nature of a payment on account. Whether the money or jewels really passed or not, their Lordships are of opinion that the respondent has failed to prove that, in consideration of them, his wife wholly relinquished her claim to dower; and consequently that the judgment of the Judicial Commissioner on this issue cannot be supported.

Mr. Bell, however, has taken other objections to the suit, which must now be considered.

He has argued that, by the general Mahomedan law, and at all events by the law of Oudh as modified by the Punjab Code, the dower was not payable except upon the dissolution of the marriage by divorce, or upon the death of the husband; and consequently that no suit for its recovery by the representatives of the wife will lie during the husband's lifetime.

Their Lordships do not think that the general law on this point is controlled or affected by the Punjab Code. The only articles which could have this effect are the 10th and 11th of the 6th section of the part entitled Principles of Law. These, like the other portions of this somewhat informal code, consist of a statement or recital of what the general law is, followed by provisions for the modification of it, in its practical application to the Punjab. These recitals cannot be taken to have altered the law, because they contain an imperfect or inaccurate statement of it. And the particular articles under consideration certainly do not contain an exhaustive exposition of the Mahomedan law relating to dower, and the circumstances under which it becomes demandable. The first contemplates only the event of a divorce; the other that of the husband's death; neither makes any distinction between prompt and deferred dower, and both assume the dower to be excessive. If then by the general law, dower, whether prompt or deferred, may be claimed from the husband by the heirs of the wife on the dissolution of the marriage by her death, that part of the law is not abrogated by the Punjab Code; although it may be true, as their Lordships think it is, that the power given to the Courts to modify excessive dowers is capable of being exercised in such a case, as well as in the particular cases expressly mentioned in the recitals.

The real question then is, whether Mr. Bell's proposition is supported by the general Mahomedan law. It clearly cannot be maintained as to dower which is prompt, and therefore exigible by the wife during the coverture. If there be any doubt on the subject, it would be set at rest by cases XXIX., XXXIII., and XXXV. in Macnaghten's "Precedents," pp. 278, 286, 288. But the note to the first of these cases shows that there is some room for doubt in the case of deferred dower. It is, of course, indisputable that the term to which payment is to be deferred may be fixed by the contract; that, for example, the husband is at liberty to stipulate that the dower shall not be payable until divorce, or his own death. The difficulty is to say what is the rule in the absence of express stipulation, as where the dower is merely described as

muwajjal," or deferred. Case XXX. of Macnaghten's "Precedents," p. 280, seems show that questions of this kind are to be termined by local usage. On the other nd, Case XXXIX. of Macnaghten's "Precedents," p. 293, seems to be an authority for lding that the heirs of the wife may sue husband in his lifetime for deferred wer.

The Hedaya appears to be almost silent the precise question; but there is a passe at pp. 155, 156 of Vol. I., which, in me measure, favors the conclusion that the rs of the wife, who has pre-deceased her band, cannot claim the dower until he has died.

Mr. Baillie, in his Digest of Mahomedan w, p. 92, states broadly that deferred wer is not exigible till the dissolution of marriage. The authority which he cites hat of Omduton Nisa Begum, 1 S. D. A. ports, p. 276. That was a case between ahs, in which it was held that a very siderable sum which had been settled as wer by deed was recoverable by the wife; hough out of regard to the letter of law, a very moderate sum had, on the formance of the ceremony, been verbally lared by the priest to be the dower. In the rse of the suit, questions were put to the officers, and in their answer to one hese, they say: "It is the custom to make half or a third of a dower muwajjal, or mandable immediately, and the remainder wajjal, or payable at a future period; the ment of the former part should be immeie; the latter part becomes payable on rce or death." This *dictum* is not pre upon the point, since the death referred may be that of the husband; and the hority is of little value, since it is clear suit having been commenced by the wife the husband's lifetime) that the dower hat case must have been prompt. He pending the suit, and the contest was mately between the wife and his heirs.

n authority of greater value is the case holam Husan Ali *vs.* Zeinub Beebee at 48 of the same volume of Reports. ere the dower was partly prompt and partly rred. Certain questions in the course he suit were put to the law officers; and fifth and sixth of them raised the question under consideration. In the answers to m it is broadly stated that "the dower is able by the husband like other debts, on demand of the wife or her heirs;" and in, that "the wife or her heirs could claim appointed dower from Jafur Ali (the husband) in his lifetime; or from his heirs after his death." But even this case does not involve an adjudication upon the question whether the deferred dower could be recovered from the husband in his lifetime; since, although the wife pre-deceased him, the suit was not instituted by her heirs until after his death, and was brought against his heirs.

Upon the whole, then, this question cannot be said to be so concluded by authority as to be free from doubt or difficulty. Clear proof of local usage might have some bearing upon it; but it ought not to be determined by mere considerations of convenience.

There may, no doubt, be great inconvenience in allowing the heirs of a wife to ruin the husband by exacting one of the enormous dowers which are so frequently stipulated for in India. But that is only one of the many inconvenient consequences of this preposterous custom. For there is also great and obvious inconvenience in allowing the assets applicable to the payment of his just and ordinary debts to be diminished, and his other heirs to be disinherited by the exaction of an enormous dower after the husband's death. Nevertheless, it has been frequently ruled by the Courts of the Regulation Provinces, and their decisions have been confirmed by this tribunal, that such contracts are strictly enforceable against the husband's estate. If the Mahomedans of India were content to fix the amount of dower according to the true spirit and intention of their law at a moderate sum, it would be perfectly agreeable to reason, that that which is intended to form part of the woman's estate should become hers on the dissolution of the marriage, whether by her own or her husband's death.

Their Lordships, however, do not think it necessary in this case to decide whether deferred dower, whenever no time for its payment is expressly limited by contract, must be presumed to be payable on the dissolution of the marriage by the death of either husband or wife, or whether it becomes demandable only on the death of the husband; for, upon the true construction of the contract in this case, they are of opinion that the dower was prompt. The admitted rule seems to be that laid down in Macnaghten's Principles, Chapter VII., article 22, to the effect that "when it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand." And this seems to have been the view taken of the

contract in the Courts below; since the objection taken to the suit on the ground that the dower could only be claimed on the divorce of the wife or death of the husband was founded upon the decision of Sir George Couper, which is set out at page 11 of the record—a decision which, as it made no distinction in this respect between prompt and deferred dower, but applied the rule to a dower of the former class, appears to their Lordships to be clearly erroneous.

Another point insisted upon by Mr. Bell was that the suit could not be maintained, because the plaintiff (the appellant), not having obtained a certificate under the provisions of Act XXVII. of 1860, section 3, was not entitled to sue for or recover a debt due to the estate of Oomrao Begum, or the proportionate share of that debt to which, as one of her heirs, he was entitled. The point was taken in the Court below was decided against the respondent by the Civil Judge, and is not made one of the grounds of this appeal to the Judicial Commissioner. This, in their Lordships' opinion, would be a sufficient answer to the objection if it were merely formal; as it would be in the case of a person who, being plainly entitled to the whole debt, might be suing for it without a certificate. Their Lordships, however, have come to the conclusion that the objection involves considerations which constitute substantial objections to the manner in which this suit is brought. The latter is obviously, as is shown by the amount of the stamp and the statements in the plaint, limited to the recovery of the plaintiff's share in the dower. Though his sisters are made formal parties, the plaint does not ask for a binding declaration as to the gross amount of the whole dower. It cannot be contended that a debtor to a Mahomedan estate is liable to be vexed by a separate suit by every co-sharer in that estate for his share of the debt. The Act invoked was probably in part designed to protect the debtor against a multiplicity of suits. And as between the co-sharers there are obvious objections to allowing a scramble for shares in an entire debt, since the first who takes out execution may exhaust the whole means of the debtor. Again, if the respondent be treated as the sharer in possession of the estate of Oomrao Begum, and the suit as one in the nature of an administration-suit, it ought to be framed as an administration-suit. No co-sharer would be entitled to receive his share until the debts of the deceased had been ascertained, and provision made for the payment of them. Until that is done, the amount of the share is uncertain; and if the appellant had clothed himself with the character of an administrator by obtaining a certificate under the Act, he must have given security for the due administration of whatever he might recover.

Lastly, having regard to the provisions of the Punjab Code, their Lordships are disposed to agree with the Judicial Commissioner in holding that it was incumbent on the Civil Judge to consider and determine more particularly than he has done what amount of dower it was reasonable, with reference to the respondent's means, to award. There should have been an express issue on that point, and a finding thereon binding on all the heirs. Their Lordships have not before them the materials for making such an award; nor, perhaps, would it be proper for them to attempt it in the absence of the daughters of Oomrao Begum.

The conclusion, therefore, to which their Lordships have come is, that they will humbly recommend Her Majesty to reverse both the decree under appeal and that of the Civil Judge; to declare that the mehr-nama on which the suit is brought is a genuine document; and that the dower stipulated therby was the sum of nine lakhs of sicca rupees; that the amount of such dower is subject to modification according to the law and practice of the Courts of Oudh; and that, subject to such modification, it was a debt due from the respondent to the estate of Oomrao Begum at the date of her death. They will further advise Her Majesty to remit the cause to the Judicial Commissioner of Oudh, with directions to have it duly ascertained what, having regard to the law and practice of Oudh, is the gross amount of the dower payable by the respondent to the estate of his deceased wife; which, if any of her debts remain unpaid, and what, after providing for the payment of such debts, is the share of the dower awarded which is due to each co-sharer in her estate. When this is done, the appellant will, of course, be entitled to sue out execution for his share only. In fixing the amount to be recovered, and in awarding execution, the Court will, of course, have regard to such special considerations (if any) as, under the Mahomedan law, arise out of the relation of the parties to each other, *viz.*, that of parent and child.

Their Lordships, considering the peculiar circumstances of this case, are of opinion that each party should bear his costs of the appeal.

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The 20th March 1873.

Present:

Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

diction—Lower Appellate Court—High Court.

Case No. 461 of 1872.

cial Appeal from a decision passed by the ubordinate Judge of Jessore, dated the th September 1871, reversing a decision f the Moonsiff of Magoorah, dated the oth December 1870.

oo Chunder Roy (Plaintiff), *Appellant,*

versus

Wooma Moyee Debia and another (Defendants), *Respondents.*

M. Ghose and *Baboo Doorga Mohun Doss* for Appellant.

oos Sreenath Doss and *Kalee Mohun Doss* for Respondents.

e Lower Appellate Court has quite as much au- y to decide upon facts as the Court of first in- , and the High Court is not at liberty to interfere erdicts setting aside judgments of the Court of stance, simply because such judgment is more ed, or even more satisfactory, on the evidence.

ackson, J.—THE questions which are ht to be raised in this special appeal are ly questions of fact. The Subordinate e in no way gainsays the special appel- s contention that he had produced evi- e, both as to the title he sets up and the cise of the rights of ownership within ve years previous to the date of suit; the Subordinate Judge, after giving icular consideration to that evidence, es to the conclusion that it did not make the plaintiff's case. We are not at liber- o set aside that judgment and order a trial, either because the evidence for the tiff, if not disbelieved, might have justi- a verdict in his favor, or because such ict was given by the Court of first in- ce. As the law now stands, the Lower ellate Court has quite as much authority ecide upon facts as the Court of first in- e, and although we disapprove and do at s interfere with verdicts setting aside ments of the Court of first instance on ficient or erroneous grounds, we are not erty to do so simply because the judg- t of the Court of first instance is more iled, or even more satisfactory on the evidence. We are far from saying, however, that the decision of the first Court is more satisfactory in the present instance.

The special appeal is dismissed with costs.

The 20th March 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Arbitration—Award—Objection—Jurisdiction.

Case No. 502 of 1872.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 20th December 1871, reversing a decision of the Moonsiff of that District, dated the 4th April 1871.

Sreemutty Hachun Banoo and another (Plaintiffs), *Appellants,*

versus

Abdool Hakim and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

Where a case is submitted to arbitration notwithstanding one of the plaintiffs actively objects, the award is invalid.

Quære.—Is an Appellate Court authorized to refer to arbitration a case pending in appeal?

Jackson, J.—THIS case has been heard *ex parte.* The judgment of the Lower Appellate Court is manifestly erroneous. The Moonsiff who tried the suit gave judgment for the plaintiffs, whereupon the defendants appealed. While the appeal was pending, an overture was made to submit the case to arbitration. One of the two plaintiffs was present, and consented for himself, and undertook to procure the consent of the other plaintiff, which he never did, and on this incomplete assent of the parties the matter was referred to arbitration. One of the plaintiffs, who is now the special appellant, not merely did not consent, but appears to have actively objected to the arbitration before the award was returned.

The Additional Judge, notwithstanding all this, went on to decide the case on the basis of the award. It is not necessary now to consider a point as to which, speaking for myself, I have some doubt, *viz.*, whether an Appellate Court is authorized to refer a case pending in appeal to arbitration, but the

whole proceedings in this case are manifestly irregular, and the Judge's finding cannot be supported.

The decree of the Lower Appellate Court must be set aside, and the case go back for re-trial.

The 1st April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, J. B. Phear, W. Markby, and W. Ainslie, *Judges.*

Res Judicata—Collector's Judgment—Act X. of 1859, s. 23, cl. 6.

Cases Nos. 1035 and 1036 of 1870.

Special Appeals from a decision passed by the Judge of the Twenty-four Pergunnahs, dated the 19th March 1870, reversing a decision of the Additional Moonsiff of Alipore, dated the 30th April 1869.

Chunder Coomar Mundul and others (Plaintiffs), *Appellants*,

versus

Namni Khanum (Defendant), *Respondent.*

Messrs. J. T. Woodroffe and *J. S. Rochfort* and *Baboo Gopeenath Mookerjee* for Appellants.

Mr. R. E. Twidale for Respondent.

Bakir Ali brought a suit against his landlord, in the Deputy Collector's Court, under Act X. of 1859, s. 23, cl. 6, for the recovery of possession of lands, claiming to hold the land under a mowrosee pottah. The landlord impugned the pottah as spurious, and upon trial the pottah was found to be genuine, and Bakir Ali got a decree.

The landlord now brings a civil suit to eject the heirs of Bakir Ali from the same lands.

The question referred to the Full Bench is, whether the previous decision as to the pottah is not conclusive between the parties.

The Full Bench answered the question in the negative.

These cases were referred to the Full Bench under the following orders recorded by Jackson and Mitter, JJ.:—

Jackson, J., No. 1035.—THE question raised on this special appeal is certainly not free from doubt. It is one on which the two Judges constituting the present Bench are not entirely agreed, and, under any circumstances, I should think it more advisable to abstain from pronouncing judgment in a case where that is so.

But, in the present case, the state of the authorities is one which entitles us to abstain from coming to a final decision, and to refer the question for the decision of a Full Bench.

In a case decided by a Division Bench of this Court, in which my learned colleague was one of the Judges (Haradhun Dey vs. Golam Hossein, 8 Weekly Reporter, page 487), it has been determined, without much argument, so far as we can discover from the judgment, that "the judgment of "the Collector in the matter of the genuine-"ness of the pottah is the judgment of a "Court competent to determine that question, "in order to the determination of the further "question of rent or of ejectment; but as it "is not the judgment of a Court of concur-"rent jurisdiction with the Civil Courts, it "cannot be pleaded as an estoppel in the "Civil Court in an action for ejectment of the "defendant as a trespasser."

That ruling has been relied on as an authority for contending in the present case that the plaintiffs, whose suit was to eject the descendants of one Bakir Ali, claiming to hold as hereditary mokurrureedars, are not precluded by a previous decision of the Collector's Court in favor of the same Bakir Ali, in a suit brought by him against the zemindars (who are identical in title with the present plaintiffs) under clause 6, section 23 of Act X. of 1859.

In pronouncing the judgment which I have just cited, Mr. Justice Loch refers in support of the view taken to a then recent judgment reported in 8 Weekly Reporter, page 177, in which difference of opinion having occurred between the two Judges of a Division Bench (Mr. Justice Campbell and Mr. Justice Phear), the matter was re-argued before the learned Chief Justice; and Sir Barnes Peacock, concurring with Mr Justice Phear, held that the Collector's Court and Judge's Court were not Courts of concurrent jurisdiction, and, therefore, that the decision of the Collector is not conclusive except on the question of rent.

The matter which was under consideration in that case was very different from the matter in the present case. The question there was, whether in a suit for rent, the defendant having set up a zuripeshgee thicca bond, and the Collector's Court having decided in favor of the validity of that bond, such decision was afterwards conclusive and binding in a suit on that bond in a Civil Court.

It is somewhat remarkable that, in a case occurring some time afterwards before a Div-

on Bench of this Court, in which Mr. Justice Loch was the senior Judge, namely, in the case of Hur Lall Shaha *vs.* Tirthanund Thakoor (13 Weekly Reporter, page 417), the learned Judge and Mr. Justice Hobhouse, delivering separate judgments in a case which appears to me extremely similar to the present case, held—Mr. Justice Loch follows: "This question having already been determined by the Collector, who had jurisdiction to try it, and whose Court was a Court of concurrent jurisdiction, I think that it is not now again open for trial in the Civil Court, and, therefore, the judgment of the Lower Appellate Court must be upheld, and the special appeal dismissed with costs."

Mr. Justice Hobhouse used words somewhat to the same effect; his words are these: "The Collector could not determine that the ejectment in the former suit was illegal until he had determined that the pottah which the present plaintiff now denies was a true pottah. He had, therefore, obviously jurisdiction to determine whether that pottah was a true pottah or not. Having jurisdiction he did determine that the pottah was a good one, and determined it as between the parties now before us. This being so, the Collector had, I think, determine in the suit of 1868, and had jurisdiction to determine, the very point now in question before us, and so the matter is *res judicata.*"

In delivering judgment in that case, Mr. Justice Loch referred to the judgment of the Full Bench in 7 Weekly Reporter, page 186, but does not refer to the case which he himself had previously decided, and which is reported in 8 Weekly Reporter.

The mode in which the decision of the Full Bench (to be found in 7 Weekly Reporter, page 186) is made to bear on the present case is this, that in that case the Full Bench expressed the opinion that the words 'suits to recover occupancy or possession of any land,' &c, in clause 6, section 23 of Act X. of 1859, refer only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title and seeks to have his right declared and possession given to him in pursuance of that title."

It seems very probable that the words in clause 6, section 23, had express reference to the two provisos in sections 21 and 22 of the same Act. But I confess that, as at present advised, I do not find anything in the terms of clause 6, section 23, which make suits brought under that clause mere possessory suits, that is to say, I do not see anything which should debar the Collector's Court under Act X. from inquiring into any plea which may be set up by the defendant in answer to the plaintiff's suit, that is, that if by possessory suits are meant such suits as are analogous to suits under section 14 of the Limitation Act of 1859, I do not find anything in the words of the Legislature to bear out that opinion, and therefore I think that the Court is not authorized in limiting the meaning of the words in a way which the Legislature has not done.

Consequently, if these are not possessory suits, it seems to me that the Collector's Court, in dealing with suits under clause 6, section 23, is vested with full jurisdiction to inquire into the matter; and if it was necessary for the plaintiff's purposes in such suit, as between him and the zemindar, to set up a mokurruree pottah under which he claimed to be entitled to possession, and that pottah were proved to be valid, he would not only be entitled to possession, but to possession as a mokurrureedar. It seems to me, therefore, in the present case, as between Bakir Ali and the zemindar, and between persons claiming under them, respectively, that the Collector's decision is a binding decision which the zemindar is not entitled now to dispute or re-open.

This being the present inclination of my opinion, and the authorities being in the state I mention, as also some other authorities which may be cited on either side, I think it preferable to refer the case to the decision of a Full Bench, and not to pass a final decision here.

Mitter, J.—I concur in the order of reference.

My views on the question which is now before us are stated at length in the written judgment which I have just put in.

Jackson, J.—It is admitted on both sides that this Appeal (No. 1036) will be governed by the order made in Appeal No. 1035, and it must, therefore, likewise be referred to a Full Bench.

Mitter, J.—In the year 1866, a man named Bakir Ali brought a suit in the Court of the Deputy Collector, under the provisions of clause 6, section 23, Act X. of 1859. His allegations were that the lands sued for were held by him under a mowrosee pottah executed by the present plaintiffs, who were made defendants in that case, and that he had been illegally ejected therefrom by them under color of a decree to which he was not a party.

The plaintiffs, in their answer to that suit, urged that there was no relation of landlord and tenant between them and Bakir Ali, and that the mowrosee pottah set up by him was a spurious document.

The Deputy Collector held that the pottah was genuine, and being further of opinion that Bakir Ali had been illegally ejected from his tenure by the plaintiffs, gave a decree to him for the possession of that tenure.

This decree was ultimately confirmed on appeal by the Judge, and a special appeal preferred against the Judge's decision was rejected by a Division Bench of this Court.

The plaintiffs have now brought the present suit in the Civil Court against the heirs of Bakir Ali, who had intermediately died, and their prayer is that they should be restored to the possession of the lands decreed to Bakir Ali in the previous litigation.

The material averments in the plaint are to the effect that the pottah set up by Bakir Ali was a spurious document; that no mowrosee lease had ever been granted to him by the plaintiffs; that whatever right he might have had during his lifetime to hold possession of the lands in question, his heirs had no right to hold them after his death; that the plaintiffs had called upon them to quit those lands by a notice duly served upon them on the 15th of Cheyt 1275; and that they, the plaintiffs, are entitled to obtain khas possession of those lands as the undisputed proprietors thereof. The plaint further states that the cause of action of the plaintiffs accrued on the date of this Court's decision in the special appeal which was preferred by them in the suit under Act X. But this is evidently a mistake. Their real cause of action, according to the plaint, is the refusal of the defendants to surrender the lands.

The defendants urged in their written statement that the plaintiffs were estopped from contending that the pottah set up by their ancestor was not a genuine instrument, inasmuch as that question had been already set at rest by the final decision of the Deputy Collector in the former suit; that it was unquestionably an authentic and valid mowrosee pottah; and that the plaintiffs had no right to eject them, they being entitled to all the rights and interests of Bakir Ali in the lands in question as his undisputed heirs and legal representatives.

The Court of first instance overruled the plea of *res judicata*, but came to the conclusion that the plaintiffs were not entitled to recover, inasmuch as the pottah was a genuine and valid mowrosee pottah.

On appeal, the Judge has confirmed this decision, but upon the ground that the plaintiffs were estopped from contesting the genuineness of the pottah by the decision of the Deputy Collector, and as the terms of that document clearly showed that the tenure was a mowrosee one, the plaintiffs had no right to eject the heirs of the original grantee.

In special appeal it has been urged, firstly, that the Judge is wrong in holding that a mowrosee tenure was created by the pottah in question; and, secondly, that he is also wrong in holding that the plaintiffs are estopped by the decision in the Revenue Court in the former suit from denying the genuineness of that instrument.

With reference to the first point, I am clearly of opinion that the learned Judge is right. If we assume the pottah to be a genuine instrument, there can be no doubt whatever that it is a mowrosee pottah on the very face of it; and I do not, therefore, think it necessary to enter into any further discussion on this point. With reference to the second point, however, I am of opinion that the conclusion arrived at by the learned Judge is not correct.

I confess that I feel considerable difficulty in dealing with the doctrine of *res judicata* in this case. The only statutory provision which we have on the subject is that contained in the second section of our Code of Civil Procedure, and I am bound to say that the decided cases are not altogether in harmony with one another.

It seems to me, however, to be quite clear that the provisions of section 2 cannot be applied to this case. In order to bring the case within the operation of that section three things must be shown, namely, first, that the parties to the two suits under comparison are the same; secondly, that the cause of action is the same; and, thirdly, that that cause of action has been already heard and determined by a Court of competent jurisdiction.

It must indeed be conceded for the purposes of the present discussion, that the parties to this suit, and those to the suit brought by Bakir Ali, are substantially the same, inasmuch as the defendants are the undisputed legal representatives of that individual. But the causes of action are manifestly different in the two cases. The cause of action in the former suit was the *illegal ejectment of Bakir Ali by the plaintiffs*. But the cause of action upon which the present suit is brought is *the wrongful withholding of possession by the defendants*, who, it is alleged

the plaintiffs, have no right to hold possion after Bakir Ali's death, inasmuch as kir Ali had no such right to transmit to m.

Even the learned Judge himself appears to e thought that section 2 was not applile to this case. He has fully gone into question relating to the mowrosee chater or otherwise of the tenure; and this would never have done, had he been of ion that the cognizance of this suit was ed by the provisions of that section.

The phrase "cause of action" used in ion 2 is certainly not susceptible of a accurate definition; but I think we safely take it to mean the alleged intion of right upon which a plaintiff es to a Court of Justice for relief. This e sense in which that expression has used in the other sections of the Code, or instance, in section 7, and I may add it has been also used in that sense in the te of Limitations. This interpretation, ever, would, to a certain extent, restrict operation of section 2. That section, st be remembered, forms part of Chap-, which treats of the jurisdiction of the Courts, and the very first section of Chapter says that the Civil Courts are to take cognizance of all suits not d by any express statutory enactment. e referred to this circumstance merely e purpose of showing that a plea under on 2 is a plea of *jurisdiction*, and unless conditions specified in that section are ly fulfilled, the Court would be bound to cognizance of the suit, whatever decision y ultimately pass upon its merits. In this even a change in the position of the es in the two suits would operate as a o the application of section 2. Suppose, nstance, that the plaintiff in the second was defendant in the first. Although the ect-matter is the same in both the suits, causes of action would be necessarily rent. The wrongful act complained of e plaintiff in the former suit cannot be dered as the cause of action of the tiff in the second suit, and section 2 d be necessarily inapplicable. If the d suit is based upon a state of facts has come into existence since the ion of the first, that state of facts, if wise sufficient, might constitute a fresh e of action. If, on the other hand, no new state of facts has happened, the er answer to the second suit would be, at it is brought upon a cause of action dy heard and determined by a Court of competent jurisdiction, and, therefore, barred by section 2, but that there is *no* cause of action to support it. Thus, for instance, if the second suit is brought upon the alleged cause of action that the plaintiff has been ejected in execution of a decree duly passed against him by a competent Court in a previous suit brought against him by the defendant, the legitimate answer would be that the rights of the parties to the property in dispute have been already set at rest by a decision which has become final in all its legal consequences; and as the ejectment of a party in execution of a decree duly passed against him is not a valid cause of action, the suit must fail, not upon the ground that its cognizance is barred by section 2, but upon the ground that it has no legal foundation, as every suit must be based upon a proper cause of action. Suppose, for instance, that Bakir Ali himself had been alive, and suppose, also, that a suit had been brought against him on the expiration of the year in which he was restored to possession by the Deputy Collector, upon the ground that he had no right to hold those lands permanently. Whether the plaintiffs could have succeeded in such a suit or not, is a different question. But it is perfectly clear that the cause of action would have been different from that determined in the former suit by the Deputy Collector, and the Court would have been bound to determine it upon its merits, in spite of the provisions of section 2. The preceding observations are, I believe, sufficient to show that section 2 has no bearing upon this case. But there is another mode in which the decision of a competent Court in a previous suit is used against the parties to that suit in a subsequent litigation between them. I mean in the shape of an estoppel. The late learned Chief Justice of this Court seems to have thrown considerable doubts upon the propriety of introducing the doctrine of estoppels in this country in the judgment delivered by him in the case of Mussamut Edun, reported in page 175 of the 8th Weekly Reporter. That doctrine, it was observed, is one peculiar to the law of England. It is intimately connected with the English law of pleadings, which has no existence in our Courts; and as its tendency is to shut out the truth, it may well be doubted whether those Courts, which are by their very constitution Courts of equity and good conscience, would be justified in adopting a doctrine which has such a tendency. But if we are at all to adopt this doctrine upon the ground of public policy or other-

wise, we must adopt it with all the limitations and restrictions which the wisdom of its framers has engrafted upon it.

One of the leading authorities on the subject of estoppel is to be found in the celebrated case of the Duchess of Kingston.* The chief propositions of law laid down by the learned Judges who were consulted in that case are :—

"*Firstly.*—That the judgment of a Court "of concurrent jurisdiction directly upon the "point is, as a plea, a bar, or as evidence con-"clusive between the parties upon the same "matter directly in question in another "Court.

"*Secondly.*—That the judgment of a "Court of exclusive jurisdiction directly "upon the point is in like manner conclusive "upon the same matter coming incidentally "in question in another Court for a different "purpose.

"*Thirdly.*—That neither the judgment of "a concurrent or exclusive jurisdiction is "evidence of any matter which came col-"laterally in question, though within their "jurisdiction, nor of any matter incidentally "cognizable, nor of any matter to be in-"ferred by argument from the judgment."

The first two propositions raise a distinction between Courts of concurrent and Courts of exclusive jurisdiction, which it is of the highest importance to bear in mind. This distinction is the basis of the decision delivered by the learned Chief Justice in the case referred to by me, and I will, therefore, confine myself to the discussion of the question as to how far the case now before us is affected by it.

The learned Judge in the Court below says that, "as the Revenue Court would "have jurisdiction in this case to eject the "defendants, the previous decision of the "Revenue Court is final and conclusive in "this Court." But the learned Judge is evidently wrong in assuming that "the "Revenue Court would have jurisdiction in "thisc ase to eject the defendants." That Court had jurisdiction, and, it must be admitted, exclusive jurisdiction, over "all suits to "recover the occupancy or possession of any "land, farm, or tenure from which a ryot, far-"mer, or tenant has been *illegally ejected* by "the person entitled to receive rent for the "same." But it had no jurisdiction whatever over a suit like the present, which is brought for the ejectment of parties who, if the plaintiff's case is a true one, cannot be regarded in any other light than that of trespassers. A suit by a landlord to eject a tenant, or to cancel a lease, was cognizable by the Revenue Court under clause 5, section 23, Act X. of 1859, provided that it was brought upon the ground of non-payment of rent or of breach of the conditions of the lease; but there is no provision in that Act for a suit of this description. It is clear, therefore, that so far as this suit is concerned, the Court of the Deputy Collector cannot be regarded either as a Court of concurrent or of exclusive jurisdiction, and hence it follows that the decision of the Court in the suit brought by Bakir Ali cannot be treated as an estoppel in the present litigation. Suppose, for instance, that the Deputy Collector had found the pottah to be a genuine instrument in a paltry suit for arrears of rent. Could it have been possibly contended that that decision would have operated as an estoppel in a suit brought by the plaintiffs for the land itself, which would be undoubtedly a suit within the exclusive jurisdiction of the Civil Court. "It is clear "therefore," observed the late learned Chief Justice in the case already cited, "that "render a judgment in such cases conclu-"sive, the Courts must be Courts of concur-"rent jurisdiction. The validity of an in-"strument involving a title to lands worth "a lakh of rupees might have to be tried for "some purpose in the Court of a Deputy Col-"lector, with no appeal to the Collector, or "before a Small Cause Court from which "there is no appeal. If the view taken by "Mr. Justice Campbell is correct, this deci-"sion would be conclusive upon every other "Court in which the validity of the same "deed might come in question for an entire-"ly different purpose, and in a claim for a "very large amount. It appears to me "therefore, that the rule which is laid down "namely, that to render a judgment of a "Court between the same parties upon the "same point conclusive in another Court, the "two Courts must be Courts of concurrent "jurisdiction. Concurrency of jurisdiction "is a necessary part of the rule which "creates an estoppel in such a case."

But the third and last proposition seems to be equally fatal to the application of the doctrine of estoppels in this case. Let us consider for a moment what was the question which the Deputy Collector had *directly* before him in the suit brought by Bakir. That question was, I apprehend, nothing more than this, namely, whether Bakir had been illegally ejected from his tenure

* 2 Smith's L. C. 679.

he present plaintiffs. This view is fully orted by the Full Bench decision of this rt, reported in page 186 of the 7th me of the Weekly Reporter. In that it was expressly laid down that clause ction 23, Act X. of 1859, refers only to *ssessory actions on the ground of illegal ment;*" and that the Civil Courts are, efore, fully competent to take cognizance its brought by tenants for the recovery eir tenures on proof of *title*, notwithstand- the concluding words of section 23, X. of 1859, which gave exclusive juris- on to the Revenue Courts over all suits ribed in that clause. The learned Judge that this case has no bearing upon the t now in dispute. But the principle which it was decided is of the utmost rtance, inasmuch as it shows clearly a suit under clause 6, section 23, Act f 1859, being essentially a suit of a ssory character, the only question h can directly arise before the Reve- Courts in those suits is the question *llegal ejectment*. It is true that the ctor has to try whether there is a sub- relation of landlord and tenant en the parties to such a suit before he sume jurisdiction over it, but that is a purely incidental to the main ques- namely, that of illegal ejectment. It has said that the Full Bench decision just cited has been virtually overruled, or at modified, by a subsequent Full Bench in which it has been held that, before a tiff can succeed under the provisions of e 6, section 23, Act X. of 1859, he is d to show that there is a subsisting re- of landlord and tenant between him he defendant. But, on closer examina- it will be found that there is no real ct between the two cases. Clause 6 ed expressly to suits brought by *ten-* for the recovery of lands from which had been illegally ejected by their land- and the Collector must, therefore, find he case before him is really the case of nt before he can assume any jurisdic- over it. This circumstance, however, t affect the validity of the position that estion of illegal ejectment is the only on which is *directly* cognizable in such . The Deputy Collector had full and jurisdiction to try whether there was sting relation of landlord and tenant en the present plaintiffs and Bakir Ali, et it must be conceded that the deter- on of that question was merely inci- to the purposes of a suit which was essentially *a suit of a possessory character* as held by the first Full Bench decision. When the Legislature gives jurisdiction to a particular tribunal to try a particular class of suits, it would necessarily be competent to that tribunal to try all questions, whether of law or of fact, upon which the right determination of those suits may depend. But it would not, therefore, follow, as a matter of course, that the decision of every question determined by such a Court, in the course of such a suit, is to be considered as the decision of a question *directly raised* within the meaning of the proposition under our consideration.

Thus, for instance, in a suit for mesne-profits, instituted in the Small Cause Court, it might be sometimes necessary for that Court to enter into the most complicated questions of law and fact affecting the title to the land for which those mesne-profits are claimed. But it would be obviously erroneous to contend that the decision of any of those questions by the Small Cause Court can be set up as a bar or as conclusive evidence in a subsequent litigation between the parties for the land itself, or that that decision is to be considered as a *direct* decision upon the question of title. Suppose, again, that the Revenue Court has decided in a suit for arrears of rent valued at a few rupees, that the defendant was bound by a kubooleut to pay a certain amount of rent to the plaintiff for a certain number of years, and suppose, also, that the kubooleut is false, the defendant himself being the proprietor of the land to which it purports to relate—would the decision of the Revenue Court on the question of tenancy be considered such a direct decision upon the point of title as to operate as an estoppel in a subsequent suit brought by the defendant for the declaration of his right, which would be admittedly a suit within the exclusive jurisdiction of the Civil Court? It would certainly be beyond the power of the Civil Court to give him any relief in the matter of the arrears already adjudged against him by the Revenue Court, for the Revenue Court had exclusive jurisdiction over that matter. But there would be nothing in the decision of the Revenue Court, upon the question of tenancy, to prevent the Civil Court from making a binding declaration that there was no relation of landlord and tenant between the parties, and thereby to save the supposed tenant from any further molestation by his opponent.

It is further worthy of remark that, however necessary it might have been for the

Deputy Collector under the Full Bench decision just now cited to determine the question of tenancy before he could give to Bakir Ali the relief prayed for by him, no question relating to the precise nature and duration of Bakir Ali's holding could have been or was directly raised before the Deputy Collector for trial. Bakir Ali might have alleged and failed to prove that he was a mowroseedar, and yet the Deputy Collector would have been bound under the first Full Bench decision to restore him to possession, if he had shown that there was a subsisting relation of landlord and tenant between him and the present plaintiffs, and that the latter had ejected him contrary to law, say, for instance, by violating the provisions of section 78 of Act X. of 1859, or by turning him out neck and crop in the middle of the year without any previous notice or any other legal proceeding whatever. Can it be contended that the present plaintiffs could not have sued him in the next year in the Civil Court upon the ground that there was no longer any relation of landlord and tenant between them and him?

It has been said that the Deputy Collector's decision ought to be considered as final, at least with reference to the genuineness of the pottah in question. But this argument is manifestly untenable. The pottah is a mere matter of evidence, and it is beyond all question that a mere matter of evidence cannot be put in issue. A disputed state of facts might legitimately form the subject of an issue. But it would be just as much improper to put in issue the documents which the parties have filed in support of their respective allegations, as it would be to put in issue the veracity of the witnesses who are summoned to depose to those allegations. The evidence of a witness as to the existence of a particular state of facts is just as much a matter of evidence as a corresponding document; and I do not, therefore, think that we ought to make any distinction between them in framing the issues. The issue of tenancy was no doubt raised in the suit brought by Bakir Ali, and the mowrosee pottah might have been put in by him for the purpose of proving the affirmative of that issue. But the opinion of the Deputy Collector on the genuineness of the pottah can be no more treated as the decision of any issue directly raised upon the point than the opinion of that officer upon the veracity of the witnesses examined by Bakir Ali.

The foregoing remarks clearly show that the matter now in dispute between the parties was neither *directly* nor *completely* raised before the Deputy Collector in the former suit, and the case would, therefore, fall within the exception specified in the third proposition above referred to. This view seems to be fully supported by the remarks made by Mr. Taylor in sections 1520 and 1521 of his work on Evidence. I do not wish to quote those sections *in extenso*, but I will simply refer to one of the cases mentioned by the learned author by way of illustration: "In "an action for debt on a bond, the defendant "had pleaded that there was an usurious "agreement between the plaintiff and himself "and that the bond was given in pursuance "thereof, and issue having been joined on "a traverse of this statement, the defendant "had a verdict, the Court held that in a subsequent action on a collateral security for "the same debt, the plaintiff was not estopped "by the former judgment from disproving "the usurious agreement, inasmuch as the "existence of such agreement had not been "*directly* in issue in the action on the bond."

For the above reasons I am of opinion that the decision of the Lower Appellate Court ought to be reversed, and that this case should be remanded to that Court for the determination of the question, namely, whether the defendants are entitled to hold the lands in dispute as mokurrureedars under the plaintiff, subject, however, to the result of the reference to the Full Bench made by my learned colleague, in which proposal I concur.

Mr. Woodroffe for the appellants.—The abstract of the case, and the question referred to a Full Bench by their Lordships Mr. Justice L. S. Jackson and Mr. Justice Mitter are as follow:—

Bakir Ali brought a suit in the Deputy Collector's Court for the recovery of possession of lands under clause 6, section 23 Act X. of 1859, against his landlord, claiming to hold the land under a mowrosee pottah. The landlord impugned the pottah as spurious, and upon trial the pottah was found to be genuine, and Bakir Ali got a decree.

The landlord now brings a civil suit to eject the heirs of Bakir Ali from the same lands.

The question is whether the previous decision as to the pottah is or is not conclusive between the parties? The Subordinate Judge held, on the Full Bench Ruling in the case of Gooroo Doss Roy v. Ramnarain Mitter, 7 Weekly Reporter 1, that the Collector's Court had not concurrent or concurrent jurisdiction when hearing a former suit under clause 6, section 23 of Act

of 1859. The cause of action in the Col-
tor's Court was illegal ejectment by the
dlord, and the relief sought was to be res-
d to possession until the landlord's title
uld be proved in the proper Court. The
ant's contention was, first, that he was a
nt; and, secondly, that he had been illegally
ted. In order to support his case, it was
essary for him to give the lease in evi-
ce, and for the Collector to decide on its
ineness only for the purpose of ascer-
ing whether the tenant had been illegally
ted. He could not decide on the validi-
f the lease so as to bar the jurisdic-
of the Civil Courts (Aradhun Dey *vs.*
m Hossein, 8 Weekly Reporter 487).
in the case of Mussamut Edun *vs.*
samut Bechun, 8 Weekly Reporter
where, in a former suit for the recovery
ent brought before the Collector by
gainst B, B set up a bond authorizing
deduct a certain portion of his rent,
apply it in reduction of the amount
to him on the bond, and the Collector
d on the evidence before him that the
was genuine: B having filed his suit in
Civil Court to recover from A the balance
under the bond, A contended that the
was a forgery; on appeal, it was held
he Collector's decision was not conclu-
except upon the question relating to the
the Collector having no jurisdiction even
quire into the validity of the bond, ex-
for the purpose of deciding how much of
ent due under the lease had been paid.
der to constitute a *res judicata*, the claim
have been raised by a previous suit in a
rt competent to entertain it, and been
rmined by the Court in that suit (Chun-
Shekur Deb Roy *vs.* Doorgendro Deb,
Weekly Reporter 39). The case of
loway *vs.* Asman Roy, 10 Weekly Re-
er 325, differs from the present case;
the title of the ryot was fully admitted,
Mr. Justice L. S. Jackson, in delivering
ment, says: "The precedent in 7
kly Reporter," Gooroo Doss Roy *vs.*
nnarain Mitter, just referred to, "applies
cases in which there is a question of title
tween the ryot and the ejecting landlord.
this case there is no such question, the
e of the ryot being fully admitted, the
fendant's answer being in this suit, as in
previous, that the ryot had granted him
ease, and so assigned to him a portion of
interest in the land, that constituting a
id answer to the first suit as well as to the
ond. It seems to me that, when the Col-
tor had with complete jurisdiction once "tried the suit, to suffer the plaintiff to raise "the same issue again in the Civil Court "would entirely frustrate the intention of the "Legislature, as expressed both in section 23, "Act X. of 1859, and in section 2 of the Civil "Procedure Code." In the Full Bench case, Prosonno Coomar Paul Chowdry *vs.* Koylas Chunder Paul Chowdry, 8 Weekly Reporter 428, it was held that the Revenue Courts were not empowered to try questions relating to rent depending upon equitable rights and liabilities arising from circumstances other than those of the relationship of landlord and tenant. The decision of the Collector was conclusive of the cause of action then heard and determined, and nothing further—Janeswar Das *vs.* Gulzari Lal, 5 Bengal Law Reports 666, note 7; 11 Weekly Reporter 216: Tekaitni Gowra Kumari *vs.* The Bengal Coal Company,* 5 Bengal Law Reports 667, note 1; 13 Weekly Reporter 129. The meaning of the words "cause of action" was very fully gone into in the case of Cherry *vs.* Thompson, Law Reports, 7 Queen's Bench 573. The rule of English law as to estoppel by judgment is applicable to cases tried under Act VIII. of 1859, and section 2 of that Act is not inconsistent with that rule; that section cannot, however, apply to this case, since the judgment of the Collector's Court was not one of a Court of concurrent jurisdiction—Khugowlee Singh *vs.* Hossein Bux Khan,† 7 Bengal Law Reports 673.

Mr. Twidale for the respondent.—I submit your Lordships ought to answer the question referred in the affirmative. Act X. of 1859 gave the Revenue Courts complete jurisdiction to adjudicate, in suits for arrears of rent, on the right to hold at a fixed rate, the right of occupancy and other rights of a permanent nature arising between landlord and tenant, in such a way as to bar all further investigations in the Civil Courts. It was so held in Ooma Churn Dutt *vs.* J. Beckwith, 5 Weekly Reporter, Act X. Rulings 3, and in Tarachand Ghose *vs.* Radha Monee Dossee, 5 Weekly Reporter, Act X. Rulings 9. Both these cases are on all fours with the present case. In Shah Anwar Ali *vs.* Nund Kishore Pershad, 1 Weekly Reporter 223, the plaintiff sued the defendant for enhanced rent under section 23, Act X. of 1859; the defendant claimed to hold under a mokurruree lease; the Deputy Collector decided the lease was a valid mokurruree lease, and dismissed the plaintiff's suit. The plaintiff then

* See 19 W. R. 252.
† 15 W. R. (P. C.) 30.

brought his suit in the Civil Court to set aside the lease of the defendant, and on the appeal it was held that it was not competent for the plaintiff to sue to set aside a tenant's mokurruree lease when once that lease had been adjudged to be valid. The case of F. Holloway *vs.* Asman, 10 Weekly Reporter 325, cited by Mr. Woodroffe, is directly in favor of my contention. It was there held that the Collector had, with complete jurisdiction, once tried the suit, and to suffer the plaintiff to raise the same issue in the Civil Court would be contrary to the provisions of section 2, Act VIII. of 1859. Hur Lall Shaha *vs.* Tirthanund Thakoor (13 Weekly Reporter 417). If the decision of the Revenue Court is not a bar to further proceedings in the Civil Court, yet the decree of the Collector's Court might, I submit, be used as evidence, and conclusive evidence, against the plaintiffs in this suit (Chowdry Teeluck Pershad Singh *vs.* Degnarain Singh, 10 Weekly Reporter 75).

Mr. Woodroffe, in reply, cited Jardine, Skinner & Co. *vs.* Dwarkanath Chuckerbutty, 14 Weekly Reporter 412; *ex parte* Vaughan, Law Reports, 2 Queen's Bench 114; Sirmut Rajah Moottoo Vijaya Ragamadha Bodha Gooroo Sawmy Periya Odaya Taver *vs.* Kutama Natchiair,* 11 Moore's (P. C.) 50.

The judgments of the Full Bench were delivered as follow by—

Couch, C.J.—In 1866, one Bakir Ali brought a suit in a Revenue Court, under clause 6, section 23 of Act X. of 1859, against the present plaintiffs, to recover possession of four beegahs of land, alleging that he held it under a maurasee lease granted by the plaintiffs, and that they had dispossessed him by proceedings taken in the execution of a decree which they had recovered against his brother. The plaintiffs, in their answer, denied that he was their tenant, and said the mokurruree pottah was a spurious document. The Deputy Collector held that it was genuine, and gave a decree to Bakir Ali for possession under it. This decision was confirmed by the Judge on appeal, and a special appeal from his decision was rejected by this Court. The defendants are the heirs of Bakir Ali, and the plaintiffs have brought the present suit to be restored to the possession of the lands of which the possession was so decreed to Bakir Ali.

The objection taken before the Subordinate Judge seems to have been that the suit was not maintainable, because the validity of the pottah had been established in the former suit. He held that the suit was maintainable, but that the pottah was a genuine one, and dismissed the suit with costs.

On appeal, the Judge has held that the decision in the former suit is conclusive in this suit, and that the plaintiff cannot now contend that the pottah is not genuine, and has dismissed the appeal without deciding whether it is genuine.

Thereupon the plaintiffs have preferred a special appeal to this Court, and the Division Bench, before which it came for hearing, has referred to a Full Bench the question "whether the previous decision as to the pottah is or is not conclusive between the parties."

The case illustrates the defects of the present system of special appeal. There is a very strong probability, to say the least, that if the Judge had determined the question whether the pottah is genuine, he would have found it to be so; and that, if this Court had power to decide the question of fact, it would find so; but the special appeal is brought for an error in law in holding that the previous decision is conclusive. The Division Court has been unable to come to a decision upon this question, and the Full Bench has to decide it. Under a better procedure, the case would be decided on its merits, and this question would most probably be an immaterial one. It must, however, now be answered.

The rule applicable to it is laid down in the Duchess of Kingston's case, *first*, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea in bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another Court; *secondly*, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. Mr. Justice Mitter, in his judgment in this case, after calling this an estoppel, says "The late learned Chief Justice of this Court "seems to have thrown considerable doubt "upon the propriety of introducing the doc-"trine of estoppel in this country in the judg-"ment delivered by him in the case of Mus-"mut Edun, reported in page 175 of the 4 "Weekly Reporter. That doctrine, it is "observed, is one peculiar to the law of "England. It is intimately connected with "the English law of pleadings, which has its "existence in our Courts, and as its tenure

* 6 W. R. (P. C.) 50.

is to shut out the truth, it may well be doubted whether those Courts, which are, by their very constitution, Courts of equity and good conscience, would be justified in adopting a doctrine which has such a tendency." These remarks oblige me to quote from the judgment of the Judicial Committee in Khagowlee Singh *vs.* Hossein Bux Khan,* Bengal Law Reports 673. After quoting the well-known passage from the Duchess of Kingston's case, their Lordships say: "There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the Civil law, and it is perfectly consistent with the second section of the Code of Procedure under which this case was tried, which says . . . ." I have carefully read the report of the case at page 175 of the 8th Weekly Reporter, and I have not found it where stated that the doctrine "is one peculiar to the law of England." Upon the mark that it is intimately connected with the English law of pleadings (meaning, I presume, common-law pleadings), and that may well be doubted whether our Courts would be justified in adopting it, I will only observe that the English Courts of equity have adopted it, as may be seen in Barrs *vs.* Jackson, 1 Phillips 582; 1 Younge and Collyer, p. 585. Vice-Chancellor Knight Bruce, in his judgment in this case, quotes various passages from the Civil law, showing the origin of the rule. That the judgment of a court of competent jurisdiction upon a question directly raised before it shall be accepted between the parties to the suit as true, appears to me to be a rule which should be adopted in our Courts. Section 23 of Act X of 1859 gave jurisdiction to the Collectors in certain suits, and, amongst them, by clause 6 in all suits to recover the occupancy or possession of any land, farm or tenure, in which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same. Mr. Woodroffe, who appeared for the appellants, relied upon the decision of a Full Bench in 7 Weekly Reporter 186, and also argued that illegally ejected means ejected otherwise than by due process of law. In the Full Bench case, the Chief Justice, in delivering judgment, said: "We think that the words 'suits to recover the occupancy or possession of any land' in clause 6, section 23 of Act X. of 1859, refer only to possessory actions against the person entitled to receive the rent, and not "to suits in which the plaintiff sets out his "title and seeks to have his right declared "and possession given him in pursuance "of that title." Bakir Ali's suit was to recover possession, and he alleged that he had been dispossessed by the plaintiffs by proceedings taken in execution of a decree against another person, which would be clearly illegal. I have no doubt that it was a suit within clause 6 of section 23; and as the plaintiff alleged that he held under a maurasee lease, it was necessary for the Deputy Collector to determine whether the lease was genuine. I must here observe that concurrent jurisdiction in my opinion refers to the matter decided upon, and it is not necessary, as Mr. Justice Mitter seems to think, that the Court whose judgment is to be conclusive should have been able to entertain the suit in which it is to be used. If it were so, a person who had sued another in the Small Cause Court of Calcutta for a debt, and obtained a judgment, could not use it in a suit in the High Court against the same person as proof that the latter was indebted to him, if the suit in the High Court was of such a nature as not to be cognizable by the Small Cause Court.

It appears to me that the question referred to us must be determined by considering what the point, upon which the judgment in the suit before the Deputy Collector was given, was. The suit was to recover possession of land from which a tenant had been illegally ejected. The Deputy Collector had to determine two questions: Was the plaintiff a tenant of the land? Had he been illegally ejected by the person entitled to receive rent for it? To determine the first of these, it was necessary for him to find whether the alleged lease was genuine; but the real judgment in the suit was that the plaintiff was a tenant, the pottah being the proof of it. The Deputy Collector had no jurisdiction to give effect to the pottah as a permanent title; he could only use it as showing that at that time the plaintiff had a right to the possession of the land. It was laid down by Lord Ellenborough in Outram *vs.* Moorwood, 3 East. 357, that a judgment is final only for its own proper purpose and object, and no other. The suit now before the Court is against the heirs of Bakir Ali, whose case is that he had a maurasee pottah; but the Deputy Collector had not power in the suit before him to adjudge that the tenancy was hereditary; and if his judgment is to be taken as being directly on that point, his is not a Court of concurrent jurisdiction.

* 15 W. R. (P. C.) 30.

His finding upon the pottah, except so far as it established the right of Bakir Ali to the possession of the land when he was ejected, must be considered a finding upon a collateral matter.

In my opinion, therefore, the question referred ought to be answered in the negative.

Jackson, J.—I desire only to say that I do not dissent from the conclusion arrived at in the judgment which has just been delivered. The inclination of my own mind has been, as the observations which I made in referring the case would show, in the other direction, and I confess that I have not yet felt sufficiently confirmed in the opinion which is now that of the majority of the Court to state it in language of express assent.

Phear, J.—This case is so nearly parallel with that which is reported in the 8 Weekly Reporter, page 175, that the reasons which I then gave for my judgment would, by the substitution of the word pottah for bond, serve to explain, almost precisely, the view which I take on the present occasion.

The cause of action upon which the present plaintiffs sue is that the defendants are wrongfully in possession of the plaintiffs' land, and are wrongfully withholding it from them. The answer of the defendants is that they are holding the land under a pottah which is maurasee in its terms, and was granted to them by the plaintiffs. Thereupon, the plaintiffs wholly deny the genuineness of the alleged pottah, and require that an issue on this point be raised and tried between them and the defendants. The defendants maintain that this cannot be done, because an issue as to the genuineness of this very document was raised between them and the present plaintiffs in a former suit, which was brought in a Court competent to decide the issue, and that it was then determined against the present plaintiffs. It is admitted by the plaintiffs that this was so, and the question before us is whether or not in view of the former determination of the issue the same issue can now be raised and tried a second time between the same parties.

It appears that the former suit which is referred to was a suit in the Collector's Court wherein the relative situation of the parties was reversed: the ancestor of the present defendants, namely, Bakir Ali, sued the present plaintiffs, the Munduls, alleging that he was entitled to possession of the land (which is now the subject of suit) as their tenant under the pottah now in question, and that they had illegally ejected him; on this ground he sought the aid of the Collector to restore him to possession. The Munduls denied the genuineness of the pottah: the question thus raised, whether or not the pottah was genuine, was decided against them, and the Collector gave Bakir Ali possession.

Now, it must be observed at the outset that the Collector's Court was a Court of limited jurisdiction, and that it had no power to determine between the parties a question of right to the land larger than the bare *right to possession.* It so happened that the plaintiff's right to possession, as he alleged it, was clothed with maurasee incidents, but the Collector's Court had no authority to determine whether such incidents existed or not; and indeed it is for this very reason that the Munduls are undoubtedly entitled, notwithstanding the Collector's decision against them in the former suit, to come into the Civil Court to have the question as to the mowrosee right tried in the present suit. If they are here to be successfully met with the objection that the Collector has already finally determined the question of the validity of the pottah, then it is obvious the result is that the Collector has indirectly, if not directly, determined a question between the parties, which was beyond his powers, and has in effect ousted the Court of superior jurisdiction, for the latter will have nothing left to it, but to, in effect, register the Collector's decision. This clearly cannot be right. And the explanation is to my mind furnished by the discussion of the matter which I offered in Mussamut Edun's case. I will not now go over the same ground again. I will simply confine myself to saying very shortly that I think the decision of the Collector upon the issue which is now before the Court, although he was unquestionably competent to try that issue for the purposes of the suit before him, did not effect a *res judicata* between the parties for all other purposes, and this for both the reasons given by Sir W. DeGrey in the Duchess of Kingston's case: *first,* the Collector had not concurrent jurisdiction with the Civil Court to the full extent of the matter involved in that issue; *second,* the issue as to the execution and authenticity of the pottah was a question of evidence collateral to the matter which the Collector had to determine.

I will add that while it is no doubt most important in this country, as in every other, to give as much finality as possible to judicial determination of matters of dispute between

ies, it is especially necessary in view of inefficiency very generally displayed by Indian Courts in the investigation and ertainment of facts, that we should be ehful not to shut out a litigant without d reason from an opportunity of showing truth of his case.

think the question put to us should be wered in the negative.

Markby, J.—In this case I also would an- the question put in the negative. But e my opinion entirely upon the peculiar acter of the Court in which the former was tried. It was a Court the juris- on of which is defined by section 23 of X. of 1859. In some of the suits enu- ted in that section, it is obvious that tions of title must sometimes arise; and o appears from section 103 that the lature contemplated that these questions d arise, and made special provisions, in they should arise, that an appeal should the ordinary Civil Court. It might, fore, have been thought that the Legis- considered that questions of title could ally adjudicated upon by suits instituted ese Courts. But the Privy Council held in the case of Khugowlee *vs.* Hossein Bux Khan, 7 B. L. R. that the decision of a Collector in such urt upon a question of title in a suit ght under clause 2 of section 23 of Act 1859 is not a decision of a Court com- nt to adjudicate on a question of title. true that this is only one of the reasons for not treating the Collector's decision onclusive in that case. It is true also the suit which the Collector had tried in case was for rent under section 2, eas this was to recover possession under e 6. But the expression of opinion as e competency of the Collector is clear distinct, and is in accordance with opi- s of high authority which have been ex- ed in this Court as is shown in the ment of Mr. Justice Mitter. Nor is it ible to say that the Court which is in- petent to adjudicate upon questions of in a suit for rent is competent to do so suit for possession. The ground of in- petency of these Courts, as pointed out e Privy Council, is the special and ary character of their jurisdiction.

pon these grounds I answer the question n the negative.

Jackson, J.—I concur in the judgment ered by the Chief Justice.

The 6th March 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Pleadings—Issues—Act VIII. of 1859, s. 141—Mortgage.

Case No. 357 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of 24-Pergunnahs, dated the 28th August 1871, reversing a decision of the First Moonsiff of Alipore, dated the 9th July 1870.

Nundo Lall Mitter and others (Plaintiffs), *Appellants,*

versus

Prosunno Moyee Debia (Defendant), *Respondent.*

Baboos Grish Chunder Ghose and *Gopal Lall Mitter* for Appellants.

Baboo Ashootosh Dhur for Respondent.

In a suit to recover possession of certain premises on the allegation that defendant had sold them to plaintiff's husband nearly twelve years previously, defendant denied the execution of the deed on which plaintiff relied. The first Court was satisfied as to the fact of execution; but, perceiving that possession had not followed, had some doubt as to the nature of the transaction, and examined a witness thereon. The result was that the transaction was found to be not an absolute sale, but a mortgage. As this fact, however, had been neither pleaded nor relied upon, the Moonsiff gave plaintiff a decree. The Lower Appellate Court, finding that the preliminary foreclosure-proceedings had not been taken by the plaintiff, reversed the decision:

HELD that the oral evidence was properly admitted by the Moonsiff as likely to explain the conduct of the parties under the circumstances described:

HELD that it was incumbent on the Court of first instance, under Act VIII. of 1859, s. 141, to frame an issue as to the nature of the transaction, and that the suit was properly dismissed by the Lower Appellate Court, because plaintiff had not foreclosed the mortgage.

Jackson, J.—IT appears to us that the decision of the Lower Appellate Court in this case upon the main question cannot be successfully assailed. The plaintiff's suit was to recover possession of certain premises on the allegation that the defendant had sold them to the plaintiff's husband in the year 1264, nearly twelve years before the time of the commencement of the suit.

The defendant absolutely denied the execution of the deed on which the plaintiff relied.

The Moonsiff, however, was satisfied upon the evidence that the deed had been executed, but perceiving that possession had not followed the execution of it, he seems to have

had some doubt as to the nature of the transaction, and thereupon a witness named Nyan Chand Bose, who had been originally named as a witness by the plaintiff, being examined, deposed that, contemporaneously with the execution of the deed, there had been a parole agreement to the effect that, if the sum of Rs. 500 advanced by the plaintiff's husband were repaid within five years, with interest at the rate of one per cent. per mensem, then the deed of sale should not take effect. Upon this the Moonsiff held that the alleged out-and-out sale was in fact not a sale but a mortgage. The Moonsiff, however, remarking in strong terms upon the obstinacy of the defendant whom he had allowed time to compromise, but who, he says, "instead of compromising, brought forward an attorney, Baboo Ashootosh Dhur, at a great cost to argue her case," and being of opinion that the defendant was not entitled to the benefit of a fact which was neither pleaded nor relied upon, gave the plaintiff a decree.

On appeal, the Subordinate Judge, considering that as the evidence showed the transaction to have been one of mortgage, and as the preliminary foreclosure-proceedings had not been taken, the plaintiff could not succeed, reversed the decision of the Moonsiff, and dismissed the plaintiff's suit.

In special appeal before us, it has been contended that the defendant has been in this way allowed the benefit of a case which she had not made, and that the evidence on which the transaction was found to be a mortgage was not admissible under the Full Bench Ruling in the case of Kashee Nath Chatterjee *vs.* Chundee Churn Banerjee, reported at 5 Weekly Reporter, Civil Rulings, page 68, and we have been asked to set aside the judgment of the Lower Appellate Court on these grounds. The special appellant also relied upon the ruling of the Privy Council in the case of Eshan Chunder Singh *vs.* Shama Churn Bhutto, 6 Weekly Reporter, Privy Council Rulings, page 57, to show that the Court must be guided by the allegations made, and the case put forward by the parties, and must not frame a case contrary to those allegations. This is not a quite correct statement of the effect of that decision, because the observations of their Lordships show that the grounds to which they adverted were not raised or suggested either by the parties or the evidence in the case. Moreover, the decision arrived at in that case was one of fact come to by a Court whose province it was not to enquire into facts, the case having been one o special appeal. It appears to us that th admission of the evidence in this case as to the character of the transaction was in accordance with the decision of the Full Bench The Chief Justice, in delivering the judgment of the majority of the Judges in that case, said: "If possession did not accompany or follow the absolute bill of sale, it would be a strong fact to show that the transaction was a mortgage, and not a sale, and it therefore becomes material to try whether the plaintiff was ever in possession and forcibly dispossessed as alleged by him, and whether, having reference to the amount of the alleged purchase-money advanced and to the value of the interest alleged to be sold, and the acts and conduct of the parties, they intended to act upon the deed as an absolute sale, or to treat the transaction as a mortgage only, for I am of opinion that parol evidence is admissible to explain the acts of the parties, as, for example, to show why the plaintiff did not take possession in pursuance of the bill of sale, if it be found that the defendant retained possession, and that the plaintiff never had possession as alleged by him, and was never forcibly dispossessed."

In the case before us, there was no allegation of possession having followed the execution of the deed. The Court had to consider the circumstance of the execution of the deed which was proved not being followed by possession. That, it was said by the Chief Justice in the Full Bench case, would be a strong circumstance to show that the transaction was a mortgage, and not a sale and if it would be a strong circumstance to show that the transaction was a mortgage we think it would certainly be in the present case a circumstance producing doubt in the mind of the Court whether really the transaction was an out-and-out sale, and oral evidence admitted under such circumstances would be likely to explain the conduct of the parties. We think, therefore, that the evidence was properly admitted.

As to the issue being raised, section 1[illegible] of the Civil Procedure Code says: "At any time before the decision of the case, the Court may amend the issues, or frame additional issues on such terms as to it shall seem fit, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made." It was, therefore, we think, incumbent on the Court to frame the issue whether the transaction was real an out-and-out sale or a mortgage. That

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was a mortgage is, we think, quite clear; and as the plaintiff is not entitled to recover possession without taking the necessary preliminary measures, we think the suit must be dismissed; but as the additional issue was not raised in the pleadings, and as the conduct of the defendant throughout has been extremely bad, it seems that we ought to modify the decision of the Lower Appellate Court by ordering her to pay her own costs of all the proceedings in this suit. If the plaintiff is desirous of taking proceedings against the defendant in consequence of her making the false verification in the written statement in this case, he will have the sanction of this Court.

The 18th March 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Attached Property—Liability of Nazir—Act V. (B. C.) of 1863—Peons.

Case No. 967 of 1871.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 30th May 1871, affirming a decision of the Sudder Moonsiff of Alipore, dated the 31st August 1870.

Kalee Coomar Chatterjee (Defendant), *Appellant,*

versus

Siddhessur Mundul (Plaintiff), *Respondent.*

The Legal Remembrancer and *Baboos Unnoda Pershad Banerjee* and *Jugadanund Mookerjee* for Appellant.

Mr. J. S. Rochfort and *Baboo Motee Lall Mookerjee* for Respondent.

Under Act V. (B.C.) of 1863, a Collectorate Nazir cannot be held personally liable for loss accruing in consequence of property which had been attached under warrant directed to him not being re-delivered on an order for its release, where such order has been duly entrusted by him for execution to a peon on the establishment.

Obiter dicta.—The *status* of a Nazir was entirely changed by Act V. (B.C.) of 1863, under which the process peon, as well as the Nazir, became a regular paid officer of Government.

The further certificate appended by the Nazir to the peon's certificate of execution or service of process does not entail on the Nazir any pecuniary responsibility, or affect the reality of the service by the peon.

Jackson, J.—THE plaintiff in this case was the defendant in a suit before the Revenue Court under Act X. of 1859. At the instance of the plaintiff in that suit, the Collector ordered the attachment of certain moveable property belonging to the now plaintiff Siddhessur Mundul. The Collector's warrant —which was a printed document, being one of the forms prescribed for adoption by the Revenue Courts—was, it seems, addressed to the Nazir of the Collector's Court, *viz.*, Kalee Coomar Chatterjee, the present defendant. This perwannah, or warrant, was made over by the Nazir to one of the peons on the Collector's establishment. The peon, it seems, reported that he had attached certain property which was specified, and made it over to the charge of several persons on whose part he produced a document called zimmanama. The defendant in the rent-suit, now the plaintiff, afterwards deposited the amount required to satisfy the rent-decree, and a further order was issued to the Nazir to release the property attached. The plaintiff's allegation in the present suit is that the property, which had been so attached, was not re-delivered to him, and on that account he sues the Collectorate Nazir as responsible for the loss which accrued to him in consequence. Both the Moonsiff of Alipore and the Zillah Judge of 24-Pergunnahs have concurrently held that the Nazir is liable, and have given judgment against him for the full amount claimed.

The case comes before us in special appeal, and the principal point which we have to decide is whether, under the circumstances, there is any personal liability attaching to the Nazir. The view taken by the Zillah Judge in his decision, which is the one immediately before us, is contained in the part of the judgment which we are about to read. He says: "It is true that the responsibility "of the Nazir is not declared in section 99, "Act X. of 1859, in the same express terms "which are used in section 233, Act VIII. "of 1859, but it appears to me that such an "express declaration was not requisite in "either case. An action assuredly would not "lie against the Nazir for the act of attach-"ment or for any other act done in execution "of the order of the Court, but it does lie "here, because he does not execute the order "of the Court for the restoration of the pro-"perty, and because his inability to restore "the property arises from his own negli-"gence and want of due care of the property "of which he assumed the custody. The "officer executing the writ is the Nazir, and "not the peada, who is a mere subordinate "of the Nazir, an agent whom he is empowered

"to employ, but not an agent on whom he is "empowered to devolve his own liabilities. "The appellant contends that, under the "terms of section 4, Bengal Act V. of 1863, "the peada is the only officer who can be "employed in the service or execution of "the process of the Court, but he selects his "own peadas, and it does not follow that "he is relieved from his responsibility by his "employment of the authorized services of "the persons whom he appoints with the "sanction of the Court." He afterwards says: "The writ, as the Moonsiff shows, is "directed to the Nazir, and he is bound to "see that it is properly executed either by him-"self or by his peadas, and if loss arises "from his want of due care either personally "or through his subordinates, he is respon-"sible for it."

The Government Advocate appeared in this case, and although we could not see that the Government had any direct interest in the matter, not being a party to the suit, we gladly heard the learned gentleman, and are much indebted to him for the assistance which he has rendered to the Court in the decision of this case.

It was contended amongst other things that both the Nazir and the peon who was the officer immediately employed to execute the warrant are paid servants of Government, and one servant is not responsible for the acts of the other; that the Nazir, like all Nazirs of the Civil Courts, has now no interest in the fees leviable as tullubana for serving processes; thatthere is no analogy between the office of a Nazir and that of a Sheriff of an English county as supposed by the Courts below; that the peon was a public servant, and that if the warrant in this case was addressed to the Nazir, it was so done in contravention of the terms of Act V. of 1863 (B. C.), and accordingly it was contended that the writ ought to have been addressed to the peon, and that the common practice in this matter was to make over warrants of Courts, though addressed to the Nazir, to the subordinate peadas for execution. Mr. Bell, we should mention, at the close of his argument, proposed to point out who was the real person who ought to have been sued and who was liable for the demand, and he contended that the Moonsiff ought to have made the parties who were really liable defendants in the suit.

As to this contention, we may observe that when a plaintiff brings a suit against a person who is not liable to him for the particular matter for which the suit is brought, it is not for the Court to go on and find out who is the person really liable to plaintiff; and as it was altogether foreign to the purposes of this appeal to consider who, if not the Nazir, was liable, we did not think it necessary to enter into that part of the case.

The Moonsiff who decided the suit in the first instance laid considerable stress upon the terms of section 87, Act X. of 1859, and the form being, we understand, the Form (F) annexed to that Act, and which is prescribed by section 86 of that Act, section 86 was repealed by Act VI. of 1862 (B. C.), and instead of that we have section 17 of Act VI., of which the last words are: "Process of exe-"cution against the person or moveable pro-"perty of a debtor shall be in the Form (E) "or the Form (F) contained in the Schedule "to Act X. of 1859, or in a form as nearly "resembling those forms as the circum-"stances of the case may admit."

Now, subsequent to the passing of Act X. of 1859, and before the bringing of this suit a material change in the law regulating the machinery for executing processes of Courts, including the Courts of the Collector, had taken place by the repeal of section 14, the only then surviving part of Regulation XXVI. of 1814, and by the enactment of Act V. of 1863 (B. C.). When Act X. of 1859 was enacted, not only the Regulation of 1814, but also Regulation V. of 1804, sections 12 and 13, were in force, and by these two provisions taken together, it was provided that all orders and processes of the Civil Courts and Revenue Officers were to be executed by the Nazirs of those Courts, who were permitted to appoint their own mirdhas and peons and who received as their remuneration one fourth of the tullubana paid in each case to the peon who carried the several processes and orders. Under that state of things a large portion, nearly the whole, of a Nazir's receipts was derived from such deduction and other fees received by him, and most probably, in consideration of that circumstance, the Nazir might have been held responsible for the acts of his peons resulting in wrongful damages to parties. That was entirely changed by Act V. of 1863 (B. C.), and the peon, as well as the Nazir, became, it seems to us, a regular paid officer of Government. It was left to the discretion of the executive Government to direct that the peons should be either paid by fixed salary or remunerated by fees, but the peculiar connection which previously existed between them and the Nazir was entirely severed. The Nazir had the nomination of them, subject to the approval

the Judge (and in this case, of the llector), but he had not the power to re-ve them, nor had he power to employ any son other than a peon appointed under that t in the service or execution of any pro-s of Court, except with the special leave of Court. We do not propose to consider e the relation between an English Sheriff d a Nazir, because we are clearly of opi-n there is no analogy whatever between case of a Sheriff and the case of a Nazir. e Moonsiff observes, referring to the pro-ons of sections 87 and 99, Act X. of 59: "These provisions show that an ficer and not a peon is to execute such rits, that he is actually and manually to ke moveables out of the judgment-ebtor's possession, and deposit them in me fit place, or keep them in the custody some fit person approved by himself." do not quite know what in the Moonsiff's d was the distinction between a peon an officer, but, if he meant to say that the ir is an officer and the peon is not, and the Nazir is actually and manually to moveables out of the judgment-debtor's ession, and deposit in some fit custody, ar that unless Nazirs are provided with physical apparatus beyond that which mmonly given to men, it would be abso-y impossible for them to undertake such e, and if to the performance of these ual functions is to be attached the corre-nding liability in such matters, we appre-d no pecuniary inducement will be cient to induce a person of respectability cept so burthensome an office. Section Act V. of 1863 (B.C.), provides: "On ery process issued for service or execution any peon appointed under this Act, ere shall be endorsed the name of the peon puted to serve or execute the same, the riod within which the peon is required certify service or execution, the amount yable for the service or execution of the ocess and the date of payment, and such dorsement shall be signed by the Nazir Clerk of the Court." This provision gnizes distinctly that it is the peon who s and executes, and it is the peon from m certificate of service or execution is taken, and if, in addition to such certi-e of service, which in my experience is ys furnished by the peon, the Nazir ap-s some further certificate of his own, it seems to us, is not sufficient to entail m any pecuniary responsibility, and does affect the reality of the service by the . The Judge finds in this case that the property in respect of which the damages were claimed had been removed from the possession of the present plaintiff, who was the defendant in the rent suit, but he says: "it is not material in this suit to find whether "the zemindars held it or the decree-holder; "for if the Nazir is primarily responsible, he "may settle with those who took the pro-"perty, and if the Nazir is not primarily "responsible, this suit must fail, because he "has been made the sole defendant." It appears to us that it was highly material to find whether the zemindar or the decree-holder held the property, because the law does not, so far as we know it, authorize the making over of the property attached to the decree-holder's custody, but it does in section 99 expressly authorize the property being left in the custody of some fit person, meaning thereby, we suppose, some independent and respectable person. The Judge states that an action lies here, because the Nazir does not execute the order of the Court for the restoration of the property. In the present case, it seems that the order of attachment was executed by one peon, and the order for restoration of the property entrusted to another. We confess we are unable to see how the Nazir, under the circumstances, failed to execute the order of the Court for the restoration of the property. Then it is said that the "inability of the Nazir to restore the property arises from his own negligence." It appears to us that there was no negligence on the part of the Nazir. He entrusted the purwanna to a peon who was appointed with the sanction of the Court expressly for the purpose of such duties, and the return of the peon with the Nazir's certificate upon it was submitted in due course to the officer presiding in the Collector's Court, and was presumably approved by him. We have already said that, in our opinion, the officer executing the writ was not the Nazir, that the peada was not a mere subordinate of the Nazir and an agent whom he had power to employ, but who, although in a subordinate capacity, was as much an officer of the Collector's Court as the Nazir himself. In this view of the case, it appears to us that the Nazir is not directly liable, as held by the Courts below, to indemnify the plaintiff, and it is not our function to settle here who is the person (if any) liable.

We are reminded that there is no specific allegation of misconduct against the Nazir in this case, but only a charge of implied neglect. The question, therefore, turns upon the general liability of the Nazir.

The judgments of the lower Courts are set aside, and the plaintiff's suit is dismissed with all costs.

The 3rd April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Right of Occupancy—Pleadings.

Case No. 683 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 5th December 1871, affirming a decision of the Moonsiff of that District, dated the 8th June 1871.

Syud Ameer Hossein (Plaintiff), *Appellant,*

versus

Sheo Suhae and another (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Mr. R. E. Twidale and *Baboo Kalee Kishen Sen* for Respondents.

Case.—In a suit to recover possession of 40 beeghas of land in a deara appertaining to mouza C, on the ground of a verbal lease from the maliks, plaintiffs having been opposed by defendants on going to take possession, the defendants averred that the lands in suit formed part of their jote of 55 beeghas, which they held from the time of the accretion of the deara. The Moonsiff, holding that the defendants had for a long time been in occupation, and that the plaintiff had no right to the land, dismissed the suit. The Lower Appellate Court upheld the decision. Plaintiffs in special appeal plead that, in a suit between the proprietors of Chintamun, from whom they derive their lease, against the maliks of Muggurpal, from whom defendants profess to hold, the Civil Court decided against the plea of limitation set up by the maliks last named, and found in favor of the former; that the deara had formed in 1859, and that they had been in possession till then; plaintiffs urge further that, even if the defendants had cultivated for 12 years under the maliks, they could acquire no right of occupancy, inasmuch as the maliks had no title:

HELD that the decree in the suit between the zemindars could not prevent the ryot from stating his facts as to the time of accretion and occupation, and that the mere fact that the person to whom he for some years paid rent had no title could not prevent his counting those years towards a right of occupancy under Act X. of 1859.

Phear, J.—WE think that this appeal must be dismissed.

The decree in the suit between the zemindars cannot shut the mouth of the ryot, and prevent him from stating in this suit his facts as to the time when the formation of the land occurred, and when his occupation commenced. Neither, as we understand the matter, can the mere fact, that the person to whom he for some years paid rent had no title, take away from him the character of ryot, or prevent him from counting those years in the time necessary to give him a right of occupancy under Act X. of 1859.

We dismiss the appeal with costs.

The 10th April 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Reg. VIII. of 1793, s. 51—Notice of Enhancement.

Case No. 787 of 1872.

Special Appeal from a decision passed by the Judge of Dacca, dated the 25 February 1872, modifying a decision of the Moonsiff of Behar, dated the 27 November 1871.

Nobo Kishen Bose (one of the Defendants), *Appellant,*

versus

Mazamooddeen Ahmed Chowdhry (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose, Nu Chunder Sen, and *Hem Chunder Banerjee* for Appellant.

Baboo Doorga Mohun Doss for Respondent.

In a suit by a zemindar against his talookdar for increase of rent under Reg. VIII. of 1793, s. 51, the notice served was HELD to be defective, because it did not state when, and for what reason, the talookdar had received an abatement of his jumma, and thereby rendered himself liable for the increase demanded.

Birch, J.—IN this case the plaintiff (zemindar) demands an increase of rent from the defendant (talookdar) under section 51, Regulation VIII. of 1793. A notice was served upon the defendant bearing date 22nd Cheyt 1277 in these terms: "Whereas you are a talookdar and are paying a lower rent than you did before, therefore, according to the provisions of section 51, Regulation VIII. of 17[illegible] you must pay for the 14 khanis of land you hold according to the rate paid in similar talooks, and from 1277 you will pay at the following rates." The defendant admits service of the notice, but pleads that he is not liable to enhancement, and that the notice

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s forth no grounds upon which increased t can be demanded from a talookdar. e provisions of section 51 are very clear, prescribe that no zemindar shall demand increase from the talookdars dependent on , except upon proof that he is entitled o do, either by the special custom of the rict, or by the conditions under which the ookdar holds this tenure, or that the talook- by receiving abatement from his jumma subjected himself to the payment of the rease demanded. The plaintiff's case is t the talookdar's jumma was at the time the permanent settlement Sicca Rs. 23-2= 's Rs. 24-11; but the only evidence he to support his case is a copy of what he ges to be an extract from a Quinquennial ister of 1206. On looking at this copy, find that it is not an extract from the ster, but a copy of the detail of the estate n by the zemindar's gomashta of the probably for the preparation of the Quin- nial Register, which was ordered to be ed at the commencement of the year 1207. plaintiff can derive no benefit from this, we observe that, in 1863, the Deputy ector before whom it was first presented other case between these parties rejected inadmissible against the defendant. If document be got rid of, then, though it be possible that the talookdar has, in years prior to 1863, paid more than 11, yet we do not think that the zemindar given evidence upon which it could be that the talookdar has received abate- s from his jumma.

is established that, in 1863, the zemindar ght a suit against the defendant for rs of rent for 1269, alleging the defend- jumma to be Co.'s Rs. 24-11; in suit it was decided that the jumma was Rs. 11, the rate at which the defend- contends he has all along been paying. e then the plaintiff has been continuously to enhance the defendant's jumma. In the Assistant Collector gave a decree nhanced rent. In special appeal the Court, on the 8th August 1867, reversed ecree, and dismissed the plaintiff's suit, g that the defendant was not a ryot, dependent talookdar, and his rent was ble to enhancement unless the plaintiff show that the rent had been changed the perpetual settlement (section 15, . of 1859). The plaintiff then served r notice on the defendant, and sued ars at the enhanced rate for the year That suit was dismissed by the y Collector on the ground that the notice was defective, and no appeal was preferred from that order. The plaintiff then served the notice which is the basis of the present suit. This notice is also defective, it does not state when, and for what reason, the talookdar received an abatement of his jumma, and thereby subjected himself to the payment of the increase demanded. Upon the case coming to trial, the plaintiff has failed to prove that the talookdar has, by receiving abatement of his jumma, subjected himself to the payment of increased rent. The decisions of the lower Courts must be reversed, and the suit dismissed, but, as the defendant has put forward evidence which both the lower Courts considered untrustworthy, we think no costs ought to be allowed.

The 16th April 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Municipalities—Illegal Acts—Damages—Cause of Action.

Reference to the High Court by the Judge of the Small Cause Court at Howrah, dated the 10th January 1873.

D. Hughes and others, *Plaintiffs*,

versus

The Chairman of the Municipal Commissioners of Howrah, *Defendant*.

No one for Plaintiff.

Baboo Juggadanund Mookerjee for Defendant.

In a suit for the recovery of damages on account of a daily fine imposed by the Municipality of Howrah, and the detention of an omnibus, which fine had been set aside by the High Court, and the detention pronounced illegal:

HELD that if the plaintiff had any cause of action, it accrued upon the seizure of the omnibus, and not upon the order of the High Court, which allowed the conviction to stand as to one rupee, and that he could not, under the circumstances, treat the continued detention of the omnibus as fresh cause of action from day to day.

Case.—A DOUBT having arisen on a question of law in the suit marginally noted, I have the honor, on the application of the defendant, to draw up a statement of the case, and to refer it under section 22, Act XI. of 1865, with my own opinion, for the decision of the Hon'ble High Court.

The plaintiffs sued the defendant for the recovery of Rs. 295 in the shape of damages, alleging that the Municipal Commissioners of Howrah imposed a fine of Rs. 2 daily, and illegally detained an omnibus of their firm from 5th July to 3rd September last; that the order of fine was set aside by the Hon'ble High Court under orders of 29th August 1872, and that the detention of their omnibus was also held by that Court to be illegal; hence the cause of action arose, and that notice for compensation was given to the Howrah Municipality.

The defendant appeared by his pleader, and urged the following pleas:—

1st.—That there is no cause of action against either the Chairman of the Municipal Commissioners or the Commissioners themselves, inasmuch as the Commissioners "as Commissioners" did not impose any fine; but Baboo Raj Mohun Bose, one of the Municipal Commissioners, as a Magistrate, imposed the fine upon Mr. Love, and issued a warrant under the powers conferred on him under section 23 of the Criminal Procedure Code and section 6 of Act III. of 1864 (B.C.).

2ndly.—That the fine having been imposed, and warrant issued by the Magistrate, and the Magistrate having acted in his judicial capacity, this action against the Municipal Commissioners cannot lie.

3rdly.—That the plaintiffs' cause of action, as stated by him to have arisen on the 5th of July, and this action having been instituted on the 29th November 1872, three months after date of accrual of the cause of action, the plaintiffs' claim is barred under section 87 of the Municipal Act.

4thly.—That no one has used the omnibus. It was detained under a judicial order, and that the plaintiff's claim for damages is excessive.

The points for adjudication which arise in this case, therefore, are:—

1st.—Whether the plaintiffs have cause of action against the Municipal Commissioners or not?

2ndly.—Whether Baboo Raj Mohun Bose, one of the Municipal Commissioners, imposed the fine as a Magistrate upon Mr. Love or not?

3rdly.—Whether the fine or issue of warrent by the said Raj Mohun Bose was in his judicial capacity or not?

4thly.—Whether the omnibus in question was detained under a judicial order or not?

5thly.—Whether the plaintiffs' claim is barred by limitation under section 87 of the Municipal Act?

6thly.—Whether the plaintiffs' claim for damages is excessive?

Respecting the first, second, third, and fourth issues, I think the plaintiffs have cause of action against the Municipal Commissioners as from the proceedings of Raj Mohun Bose [copy of which (marked A) is herewith submitted] as well as from his examination before me, it appears that he has not taken any evidence whatever to warrant him to convict Mr. Love. Under such circumstance, though he has been invested with the powers of a Magistrate, yet his not having acted as a judicial officer, such proceedings cannot be held as "judicial." The order was passed merely on the statement without oath of a servant of the Municipality, and it was not signed as a Magistrate, nor the warrant as such [copy of which (marked B) is herewith also submitted], but as a Municipal Commissioner, which order has been held by the Hon'ble High Court to be illegal and set aside, and the fine imposed has been refunded. Therefore, the detention of the omnibus of the plaintiffs under an illegal order of one of the Municipal Commissioners subject them to pay the actual loss sustained by the plaintiffs by their illegal act.

It is argued by the defendant's pleader that Mr. Love had confessed the offence charged against him, and it was, therefore, not necessary to take evidence; but from the "Prosecution Book" it would appear (from the exhibit A) that there is no such confession, Mr. Love has only said "আসামি বলিলেক যে পুরাতন ঘর মেরামত করিয়াছি মাত্র." Translation: "The defendant answered that he has only repaired his old house," which cannot be construed to imply an admission of the offence charged.

With regard to the fifth issue the illegality of fine, for the recovery of which the omnibus was detained, not having been determined by the Hon'ble High Court till 29th August last, I think that the plaintiffs' cause of action accrued from that date, and the plaintiffs having given notice under section 87 of the Municipal Act on the 10th September last, and this case having been instituted on 29th November last, their claim for damages is not barred by the section above quoted.

As to the sixth issue, it is proved by the evidence of the plaintiffs' two witnesses, Mr. C. W. Harcourt and Kylash Nath Banerjee that they used to pay a daily hire of

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for the omnibus and two horses. Under such circumstance, plaintiffs are not entitled to that rate, as the horses were in their possession, and they were at liberty to employ them in any other way by which they might have derived profit, and it is not shown that the horses were not so employed. I would, therefore, divide the daily income of Rs. 5 into three equal parts, two for the two horses, and one for the omnibus, and give the plaintiff a decree for Rs. 98-5-6, with costs in proportion, Rs. 13-14-8, in all Rs. 112-3-14, subject to the orders of the Hon'ble High Court.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—It is not necessary to decide whether the acts complained of are such as would be protected by Act XVIII. of 1850. The cause of action was the seizure of the omnibus, which took place on the 5th of July. Either that seizure was a lawful one by virtue of proceedings to recover the fine which had been legally imposed by the Municipal Commissioner, acting as a Magistrate, or it was a seizure without any justification, in which case there would be a cause of action. The Judge of the Small Cause Court is mistaken in supposing that the cause of action arose upon the order of the High Court being made. That order gave no fresh cause of action; it did not even set aside the conviction, but allowed it to stand as to one rupee, and to that extent the seizure of the omnibus might be justifiable. It is a mistake to suppose, as I observe is often done, that where a proceeding is illegal, and may be a cause of action, the cause of action does not arise until the proceeding has been set aside by the Court. There may be cases in which, before an action can be brought, it is necessary to have the proceedings set aside; but where there is an entire want of jurisdiction, where the alleged wrong-doer is not acting judicially, and would have no protection from his judicial capacity, it is not necessary to wait until his illegal and unfounded proceedings are set aside. In this case, if the plaintiff had any cause of action, it accrued upon the seizure of the omnibus, and he was bound to bring his suit within three months from the time of the seizure. He could not, under the circumstances, treat the continued detention of the omnibus as fresh causes of action from day to day; and that is not the view taken by the Small Cause Court Judge.

The case has been referred to us in a manner which makes it somewhat difficult to deal with it. But the law seems to authorize this mode of reference; because section 22 of Act XI. of 1865 says that the Judge is to state the case, and refer it for the decision of the Court. Upon the statement which he has made, I think there is sufficient to enable us to determine that the suit was barred by section 87, Act III. of 1864 (B. C.). Therefore, the judgment which has been given by the Small Cause Court must be set aside, and the suit of the plaintiff must be dismissed, but without costs.

Glover, J.—I am of the same opinion.

The 16th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Zemindaree Business—Mookhtears and Kurpurdauzes—Jurisdiction—Small Cause Courts—Act XI. of 1865, ss. 8 and 11.

Reference to the High Court by the Judge of the Small Cause Court at Burrisal, dated the 16th January 1873.

Nobin Chunder and others, *Plaintiffs*,

versus

Buroda Kant Shaha and others, *Defendants*.

"Zemindaree business" is not such business as is intended by Act XI. of 1865, s. 8; and mookhtears and kurpurdauzes carrying it on are not servants or agents within the meaning of s. 11.

Where zemindars from the mofussil come in occasionally to the head-quarters of a Small Cause Court to prosecute or defend suits, settle business with creditors, or for social intercourse or medical treatment, and remain in their boat, or put up in the house of their mookhtears and kurpurdauzes, they cannot be said to have a "lodging" within the limits of the Court such as is intended by s. 8, explanation (*a*).

Case.—I HAVE the honor, under section 22, Act XI. of 1865, to solicit the opinion of the Hon'ble Court on the points stated below.

I beg respectfully to state that, in the five cases noted in the margin, *ex-parte* decrees were passed against the same defendants in favor of different parties for money due on bond as well as for price of articles supplied. In their execution the decrees, on the objection of the defendants, being ordered to be set aside, and new trials ordered, the defendants now object to the jurisdiction of this Small Cause Court on the grounds that they are permanent inhabitants of zillah Furreedpore; that they did not dwell or work for gain in person or by servant or agent within the

local limits of the jurisdiction of this Court at the time of the commencement of the suits, or when their cause of action arose, and they had no lodging for any temporary purpose at those times within such limits; that they have landed property in this district situated beyond the limits of the jurisdiction of the Court, to look after the management of which they generally remain in the interior, and only occasionally come in the station where the Small Cause Court is situated, to prosecute or defend suits between themselves and their ryots or shareholders in other Courts, or for the sake of merely enjoying the company of friends in the town, or to take proper medical treatment when they are ill, or to settle business with their other creditors, and borrow money from them, they come and live for a week or a fortnight or so each time, and sometimes remain in their boat, or put up in the house of their mookhtears and other kurpurdauzes employed for the purpose of conducting all sorts of cases arising in their zemindaree; that they had mercantile transactions within the jurisdiction of the Court long before the cause of action in the present cases arose, but since they have not carried on any business or dwelt in person or by servant or agent within its limits for any other purpose than those stated before. It is true that their mookhtears and kurpurdauzes dwell within the jurisdiction of this Court, but that does not make them (defendants) constructive dwellers within such jurisdiction, and they cite precedent to that effect as noted in the margin.

Jamulloon Nissa v. Mofeesun Nissa, dated 15th April 1867, page 18 of Sutherland's Small Cause Court Reference.

The plaintiffs, on the other hand, say that the above case was decided while Act XLII. of 1860 was in force. Under section 4 of that Act, which is repealed, the jurisdiction of the Small Cause Court was confined to a defendant who, at the time of the commencement of the suit, dwelt or personally worked for gain within its local limits. Now, under section 8, Act XI. of 1865 (present Small Cause Courts Act), a suit will lie against a person if he shall dwell or personally work for gain or carry on business within the local limits of the jurisdiction of such Court, or if the cause of action arose within the said local limits, and the defendant, at the time of commencement of the suit, shall by his servant or agent carry on business or work for gain within those limits. In explanation (*a*) of the above section, it is provided that, when a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to dwell at both places in respect of any cause of action arising at the place where he has such temporary lodging. Again, in section 11 of the Act, it is provided that service of summons on any servant or agent, by whom the defendant may carry on business or work for gain, shall be good service upon the defendant, if such servant or agent, at the time of such service, personally carries on business or works for gain for the defendant within the jurisdiction of the Court in which the suit is brought. They cite a precedent noted in the margin, in which the meaning of the word 'dwelling' is explained, and also held that a suit against a defendant will lie in his temporary place of abode instead of in the place of his permanent dwelling when he spends the greater part of his time in the former place. I, therefore, firstly, beg most respectfully, under the circumstances stated above, the opinion of the Hon'ble Court that if, when the causes of action in all these cases arose, the defendants had, within the local limits of the jurisdiction of this Court, where at the commencement of the suits, their mookhtears and kurpurdauzes to conduct suits and carry on business connected with their zemindaree affairs, whether the defendants under the latter part of section 8, Act XI. of 1865, can be considered were carrying on business or working for gain within those limits by their servant or agent? If so, I have the honor, secondly, to ask that if the defendants occasionally come and live for short periods within the limits of the jurisdiction of the Court in the manner and for the purposes before stated, whether it can be held that they had their temporary lodging within such limits as provided in Explanation (*a*) of the section by which the jurisdiction has been extended. Thirdly, as the summons in some of these cases were served on the above mookhtears and kurpurdauzes, whether the substituted service on agents or servants, contemplated in section 11 of the Act can be held good service also in the present case. Clearly to remove my doubts, I lastly beg most respectfully to ask, whether the business contemplated in section 8, and the terms "agent", or "servant" in section 11, are intended to comprise as such in general or only mercantile business and agents or servants employed for those purposes. I am of opinion that those words are used there to signify only the latter, and not zemindaree business or agents or

Porgash Parey v. Hachim Khansama, page 43, dated 27th April 1867, Civil and Criminal Reporter.

nts employed only to conduct such indaree business.

he judgment of the High Court was delivered as follows by—

ouch, C.J.—As to the first question d, we are of opinion that what is called he Small Cause Court Judge "zemin- e business," and is so described in the , is not such a business as is intended section 8, Act XI. of 1865; and that e defendants were not by their servants gents carrying on business or working ain within the limits of the Small Cause t.

s to the second question, namely, whe- it can be held that the defendants had a orary lodging within the limits of the t as provided in Explanation (*a*) of on 8, it is not stated that, at the time suit was commenced, they were at such ing. It would seem from the third tion regarding the mode of service of summons, that they were not, when the was commenced, at any lodging with- e limits of the Small Cause Court. But t from that, it appears to us that the stated in the case do not show a lodging as is intended by explanation (*a*).

s to the third and last question, about the ice of the summons, we are of opinion the servant or agent mentioned in section a servant or agent as described in section d that the mookhtears and kurpurdauzes, ying on what is called "zemindaree ness," are not servants or agents within meaning of section 11 upon whom the mons might be served.

The 17th April 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Decree—Construction.

Case No. 212 of 1872.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 23rd December 1871, reversing an order of the Moonsiff of Radhanuggur, dated the 23rd September 1871.

Chunder Mohun Thakoor and another (Intervenors), *Appellants,*

versus

Amirto Chunder Thakoor and others (Decree-holders), *Respondents.*

Baboo Umbika Churn bose for Appellants.

Baboo Ashootosh Mookerjee for Respondents.

Where a case was "decreed with costs and damages," the decree not indicating what damages were to be paid, or who were the persons made liable, the first Court was held to have dealt reasonably in construing it with the recital which preceded those words, and a portion of the judgment which was set out on the decree.

Markby, J.—We think that in this case the order of the District Judge must be set

aside, and the order of the Moonsiff restored. The decree, which is now sought to be executed, was drawn up in a most slovenly manner, and has caused great deal of trouble and litigation between the parties. If we look at it in the narrow way in which we are asked to look at it by the respondent, and in which the District Judge has looked at it, we think that the decree, as it stands, cannot be executed. It says that " the case be decreed with costs and damages," and then follows a schedule of costs incurred by each party concerned, but not in the least indicating what damages are to be paid, and who are the persons made liable under the decree. But, if we look at it as the first Court had looked at it with the recital which precedes these words, and the portion of the judgment which had been delivered by the Deputy Collector, and which is set out in the decree, we think the reasonable construction to be put upon the decree is that which was put upon it by the first Court, namely, that the two persons who are now appellants before us are not liable under it. The order of the Lower Appellate Court will, therefore, be set aside, and the order of the Moonsiff restored. The respondent must pay the costs of this Court and of the Lower Appellate Court.

The 18th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Joint Possession—Dispossession—Cause of Action—Limitation.

Case No. 965 of 1872.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 27th March 1872, modifying a decision of the Subordinate Judge of that District, dated the 2nd May 1871.

Jadub Chunder Sandyal (Plaintiff), *Appellant*,

versus

Bhyrub Chunder Sandyal and another (Defendants), *Respondents*.

Baboos Mohinee Mohun Roy and *Bhyrub Chunder Banerjee* for Appellant.

Baboos Kalee Mohun Doss, *Doorga Mohun Doss*, and *Issur Chunder Chuckerbutti* for Respondents.

Where parties are living together in commensality and in joint possession of property, no cause of action arises to one of them for the recovery of his share until he is dispossessed by the other, and limitation runs from the date of such dispossession.

Couch, C.J.—The Judge says that the evidence of the plaintiff's witnesses proves, in his opinion, that the plaintiff and the first defendant are living together in commensality, and, in respect of this property, that they were in joint possession of 8 annas thereof; that the witnesses he names prove that much and no more, and that, to that extent, they are corroborated by the admission of the defendants, and upon that state of facts he decides that the suit of the plaintiff is barred as to 4 annas by the Law of Limitation, because, in his opinion, the *onus* was on the plaintiff to prove that he had been in his sole and exclusive possession of 8 annas, which he claims

e time within 12 years of the institution e suit. In that opinion, we think, he was ely wrong. . If the plaintiff had been, as Judge finds he had, within 12 years in ession with the defendant of the whole e 8 annas, if it was not a separate but a possession, not a possession by the de- ant of a certain portion and by the plaint- f a certain other portion, but a posses- by both, the plaintiff would have no cause ction for the recovery of the property he was turned out of possession by the ndant. His cause of action would be a ssession by the defendant, and upon the g of the Judge that did not take place than 12 years before the suit was ht. Therefore, the Judge was wrong in g that the Law of Limitation applied to e. The only question now is whether, g necessary to reverse his decree, we to remand the case for any inquiry as title of the defendant under this alleg- bâ. We think, looking at the finding first Court, and what is stated in it the nature of the evidence produced in t of this hebâ, we should be wrong in ng such an inquiry; for if the Appel- Court were to come to a conclusion that bâ is proved upon the materials which the record, it would be, in our opinion, improper finding. We are not bound and the case, and we think, under the stances, that we ought not to do so. t we should do is to reverse the deci- f the Appellate Court, and allow the of the first Court to stand. The de- the Appellate Court will be reversed, e appellant will have the costs of this .

The 18th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Code of Criminal Procedure, ss. 308, 310, 311—Civil Courts—Jurisdiction.

Case No. 1012 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 28th March 1872, reversing a decision of the Moonsiff of that District, dated the 30th September 1871.

Meechoo Chunder Sircar and others (Plaintiffs), *Appellants*,

versus

J. H. Ravenshaw, Magistrate of Dinagepore, for self and on behalf of the Government (Defendant), *Respondent*.

Baboos Romesh Chunder Mitter and *Rajendro Nath Bose* for Appellants.

Mr. Bell and *Baboo Unnoda Pershad Banerjee* for Respondent.

The Magistrate, considering plaintiffs' mud *kotha* to be an obstruction on a public thoroughfare, made an order under s. 308, Criminal Procedure Code. Plaintiffs being dissatisfied with the order, applied under s. 310 for a jury to try the order. A jury was appointed, who found that the order was reasonable and proper, and that the building was an obstruction. Plaintiffs then sued the Magistrate, complaining that, by his order, the building had been demolished, and the materials carried away, and claiming the value of the materials and recovery of the land:

HELD, with reference to s. 311, that the suit would not lie; and that the decision of the jury as to the proprietorship of the land could not be questioned in a civil suit.

Couch, C.J.—In this case it appears that the Magistrate, considering there was an unlawful obstruction or nuisance on a public thoroughfare by the buildings which are called in this suit the plaintiffs' mud *kotha*, made an order under section 308 of the Code of Criminal Procedure. The plaintiffs, dissatisfied with the order, availed themselves of the power given to them by section 310, and applied to have it tried by a jury whether the order of the Magistrate was a right and proper one. A jury was appointed, and their finding was that the order was reasonable and proper. They also found that this building of the plaintiffs was an obstruction to the public thoroughfare. The present suit is brought against the Magistrate, the plaintiffs complaining that by his order the building had been demolished, and the earth had been taken away for the purpose of repairing the adjacent public road, and claiming Rs. 200 for the value of the materials of the building, and asking for the recovery of the land as to which the suit is valued at Rs. 800.

Now, section 311 says that no suit or action shall be entertained in any Court in respect of anything necessarily or reasonably done to give effect to the order of the Magistrate after the finding of the jury, where there is a jury, and where no jury is applied for, after the passing of such order. In regard to the damages claimed for the demolition of the building, they are clearly claimed for something which was necessarily and reasonably done to give effect to the order for removing the obstruction. It is plainly within the terms of section 311, and no action can be brought for it. Then, in regard to the part of the claim which is for the recovery of the land, although it is put in that shape, it is, in reality, an action against the Magistrate on account of the plaintiffs having been dispossessed of what they say is their land in carrying out this order. If there is any cause of action against the Magistrate, it is that he has dispossessed the plaintiffs of their land, and he has only done so in giving effect to an order made under section 308 of the Code of Criminal Procedure. State the nature of the plaintiffs' claim in any way you may, it comes within that section.

There is another objection to the plaintiffs being allowed to sue for the recovery of the land; they say, in fact, the land is our private property; there is no public road or way over it, and it is no part of a thoroughfare, and so we claim to have possession of it given to us. But the question as to whether it is part of a public thoroughfare has been tried in the manner which the law has provided in the Code of Criminal Procedure, namely, by a jury, and it has been found against them. We say nothing as to the propriety of that decision (probably it is a very right and proper one), as we have nothing to do with that now. The plaintiffs have had what the law gives them, the right to have the question determined by a jury partly selected by themselves, and a majority of the jury has found against them. They are not at liberty to bring a suit in the Civil Court to have the question tried again, and in fact, to have the order of the Magistrate under section 308 and the finding of the jury reversed, and the whole matter re-opened. The consequence of that, as pointed out by the Legal Remembrancer, would be that there might be another order by the Magistrate, another jury appointed, another similar finding, and then another suit, and so on. The law does not allow that.

There are no grounds, therefore, for this appeal, which must be dismissed with costs.

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The 18th March 1873.

Present:

e Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

ent-suit—Pro-forma Defendants—Act VIII. (B. C.) of 1869, s. 29.

Case No. 423 of 1872.

ecial Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 7th December 1871, affirming decision of the Additional Moonsiff of Panch Pookoreah, dated the 10th April 1871.

nga Gobind Sen (one of the Defendants), *Appellant,*

versus

bind Chunder Doss and another (Plaintiffs), *Respondents.*

boo Doorga Mohun Doss for Appellant.

oo Bungshee Dhur Sen for Respondents.

a suit against ijaradars for arrears of rent, where tiff made his co-sharers *pro-formâ* defendants, it HELD that this circumstance did not alter the real acter of the suit, which would fall under Act VIII. C.) of 1869, s. 29, and be governed by a limitation ree years.

ackson, J.—THE plaintiff in this case the defendants, who are ijaradars of the erty in which he was a joint owner or harer, for arrears of rent extending over period of six years. He first brought uit in the Revenue Court, and inasmuch e co-sharers had not joined him in that he made them co-defendants. It does appear that the plaintiff sought any relief nst these co-defendants, but by reason of being parties to the suit, it was held by ivision Bench of this Court that the suit constituted could not proceed in the enue Court. The plaintiff, therefore, has instituted the suit in the Civil Court. as brought in February 1871, therefore e time after the Bengal Law Act VIII. of came into operation.

he defendants objected that, under the of Limitation applicable in the case, no e than three years' rent could be recover- but the Subordinate Judge has held, ning the decision of the Moonsiff, that e 16, section 1, Act XIV. of 1859, ap- to the case.

appears to us that, although the co-shar- were made *pro-formâ* defendants in the case, that does not alter the real character of the suit, which is to recover arrears of rent, and that, therefore, the provisions of section 29, Act VIII. of 1869, apply to the case. That being so, even allowing plaintiff the space of nine months and eighteen days during which his previous suit was pending, it seems that all claim for rent beyond three years is out of time. This case is clearly distinguishable from the case reported at page 390, Volume XIII., Weekly Reporter. There it was held that the subject of the plaintiff's claim was not rent, it being sought to enforce certain liabilities arising out of equities as against parties who were not the ostensible tenants. We think the judgment of the lower Court must be modified on this question. The plaintiff will get a decree for only three years' rent. Each party will pay his own costs.

The 19th March 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Enhancement — Ejectment — Tenant's Rights.

Case No. 462 of 1872.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 28th December 1871, modifying a decision of the Moonsiff of Alipore, dated the 29th December 1870.

Menazooddeen Goledar (one of the Defendants), *Appellant,*

versus

Moonshee Kuleemooddeen Ahmed (Plaintiff), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Sham Lall Mitter for Respondent.

A tenant in possession under a pottah, and after execution of a kubooleut, is entitled to the usual notice before he can be evicted, or his rent enhanced, by a decree of Court. He cannot be made liable to enhancement or ejectment in a suit against a third party where he is merely made a defendant.

Jackson, J.—THE plaintiff in this case sued upon a categorical full allegation to the effect that the defendant, one Arman Goledar, held under him a parcel of land, being part of what are called "canal surplus lands;" that this Arman Goledar had been served with a notice of enhancement on the ground that he was holding land in excess of what

he paid rent for; that the defendant had agreed to pay such enhanced rent, but had not paid it. The suit, therefore, was to evict Arman Goledar from the land so held by him.

Arman Goledar appeared in answer to the summons, and stated that not he, but one Menazooddeen, the special appellant before us, was in occupation of the land, and he prayed that Menazooddeen might be made a defendant in the suit, which was done.

The suit coming on for trial before the Moonsiff, he held that the plaintiff was entitled to recover possession of the land by ejecting Menazooddeen, and he further declared that "the amount of wassilat from September 1868 to the date when plaintiff shall take possession in execution shall be ascertained in execution," but, inasmuch as he considered that Arman had laid himself open to the plaintiff's claim by having appeared before the Deputy Collector and made some statement in respect of the land, he ordered him to pay his own costs.

Both the defendants appealed to the District Court separately, and the Judge ordered, modifying the decree of the Court below, that Menazooddeen must be ejected, and that the plaintiff was to receive from him "compensation at the rate of Rs. 94-8 per "annum, from the commencement of his "own lease, that is to say, from September "1st, 1868, to December 13th, 1869, being the "date on which Menazooddeen was made a "party to the suit, and from that date to the "date on which he may recover possession "of the land at the rate of Rs. 283-8 "per annum." The Judge justifies this decree as to the rate of rent or compensation which he adjudges against Menazooddeen on the ground that, "from "the time he was made a defendant to this "suit, he had notice that, if he continued to "hold the land, he must pay rent for it at "the rate of Rs. 3 per cottah per mensem, or for the whole piece Rs. 283-8 "per annum." The Judge goes on: "The plaintiff had a full right to demand "that rental as the condition of the retention of the land, and to obtain compensation at the same rate as the land was not "relinquished. Nor is the claim exorbitant, "as the plaintiff pays Rs. 575 per annum "for 1 beegha 11 cottahs 8 chittacks, which "is at a rate of somewhat more than Rs. "1-8 per cottah per mensem, and Menazooddeen occupies the best portion of the "plot."

We confess we are unable to see on wh ground Menazooddeen is liable to be ejecte or ordered to pay the rate of compensatio as directed in this suit. Menazooddeen, seems, had got a pottah, and executed kubooleut for this land. We are, therefo fairly entitled to assume that the plaint knew, or if he chose might have known, th it was so. At any rate he might ha known that Menazooddeen was in possessio of the land, and yet he brings the suit on th deliberate statement that Arman was possession of the land, and had made defa How, under these circumstances, Menazoo deen could be affected by any notice Arman to pay enhanced rent, or be ma liable to be ejected, we are at a loss understand. He, being the tenant on the la was entitled to the usual notice before could be evicted or his rent enhanced b decree of the Court, but we do not see h in a suit against Arman in the midst of agricultural Bengalee year he could be ma liable to pay three times the rent he p before or in default be ejected. We th therefore, that the suit against Menazo deen must fail, and considering the circu stances of the case, from which one hardly help thinking that the suit brou against Arman was fraudulently brou with knowledge that Menazooddeen was tenant, it seems to us that what the Co below should have done was to dismiss whole suit. We think the judgments of lower Courts must be reversed, and plaintiff's suit as against Menazooddeen missed. That portion of the decrees of lower Courts which directs Arman to his own costs shall stand. The special ap lant will have his costs in all the Courts.

The 21st March 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. Birch, *Judges.*

Issues—Acquiescence—Jurisdiction.

Case No. 822 of 1872.

Special Appeal from a decision passed the First Subordinate Judge of Hoo dated the 24th February 1872, rever a decision of the Moonsiff of Jehan dated the 21st August 1871.

d

Gopal Chunder Ghose and another (Plaintiffs), *Appellants*,

versus

Tincowree Mundul and others (Defendants), *Respondents*.

Baboo Umbica Churn Banerjee for Appellants.

Baboo Kumlakant Sen for Respondents.

In a suit to recover a share (of land) which had been sold by plaintiffs' eldest brother, the manager of the household, to defendants 1 and 2, where the first Court, on the issue whether the property had been purchased before separation and with self-acquired funds, decided in favor of plaintiffs, and gave them a decree, the Lower Appellate Court admitting that plaintiffs had held joint possession, nevertheless, from certain circumstances in the case, concluded that the sale had been with their acquiescence, and dismissed the suit:

HELD, that the Lower Appellate Court had no authority to do so, after having found the only issue in the plaintiffs' favor.

Mitter, J.—THE plaintiffs in this case are the brothers of defendant No. 3, and they brought this suit to recover possession of a two-third share of certain lands, which has been sold by the said defendant to the defendants Bipro Dass Mundul and Tincowree Mundul.

The only issue joined in the Court of first instance was "whether the property in dispute was purchased before or after the separation of the plaintiffs and defendant No. 3, or whether it was purchased with Doytary's own self-acquired funds." The first Court determined this issue in favor of the plaintiffs and gave them a decree.

On appeal, the Subordinate Judge has reversed the decision of the Moonsiff for reasons which, we are bound to say, appear to us to be inconsistent with the pleadings of the parties and the evidence adduced by them in support of their respective allegations. The Subordinate Judge distinctly admits in his judgment that the family was joint, and that the lands in dispute had been in the joint possession of all the three brothers, that is to say, of the plaintiffs and defendant No. 3. But the Subordinate Judge goes on to say: "As defendant No. 1 alone brought that suit as eldest and manager of the household, and plaintiff did not object to the compromise, and defendant has held unmolested possession since the purchase from defendant No. 3, I cannot help concluding that the previous suit was instituted and compromised, and the property sold to defendant with the consent of the mother, and that defendant No. 3 under cover of his mother has brought this suit to take back the two-thirds which were sold in good faith at the time and possession delivered over to the defendants."

We are clearly of opinion that the Subordinate Judge had no authority to dismiss the plaintiffs' suit on these grounds, after having found the only issue joined in the Court of first instance in the plaintiffs' favor.

There was no plea of acquiescence or of ratification set up by the defendants Bipro Dass and Tincowree, and, in fact, no such plea could have been set up by them at least with reference to one of the plantiffs, who is still a minor.

Under such circumstances, we are bound to reverse the decision of the Subordinate Judge, and to affirm that of the Moonsiff, the only issue joined in the Courts below having been found in the plaintiffs' favor.

The defendants Tincowree Mundul and Bipro Dass Mundul must pay the whole of the costs of this litigation.

The 21st March 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges*.

Ejectment—Mokurruree Istemraree Ijaradar—Amendment of a Decree.

Case No. 667 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 22nd December 1871, reversing a decision of the Assistant Collector of that District, dated the 4th September 1871.

Mohunt Buloram Doss (Defendant), *Appellant*,

versus

Jogendro Nath Mullick and others (Plaintiffs), *Respondents*.

Baboos Obhoy Churn Bose and *Mohendro Lall Mitter* for Appellant.

Baboos Gopal Lall Mitter and *Grish Chunder Ghose* for Respondents.

The liability to ejectment of the holder of a mokurruree istemraree ijarah is to be determined by the conditions of his lease, and not by the provisions of Act X. of 1859, s. 21.

For a Judge to amend his decree in the absence of a defendant, and without previous notice to him, is to act without authority and contrary to law.

Mitter, J.—In this case we are not prepared to hold that the Judge has committed any error in law in finding upon the evidence that the rent of the defendant's tenure was payable according to the Velaity, and not according to the Bengalee, year. The pottah and razeenamah relied upon by the special appellant do not contain any express provision on the point. It is true that the kistbundee recorded at the foot of the pottah commences with the month of Bysack and ends with that of Cheyt; but as the names of the months are identical in both the calendars, we are not prepared to say that the conclusion arrived at by the Judge is contrary to the terms of the written engagement between the parties, or that the evidence upon which that conclusion is based ought not to have been admitted and acted upon by him. We are of opinion, however, that the decree for ejectment cannot stand.

The plaintiff stated in his plaint that an arrear of rent having fallen due to him, and the month of Jeit of the Velaity year having expired, the defendant was liable to be ejected from his tenure. This reference to the expiration "of the month of Jeit of the Velaity year" was evidently made for the purpose of bringing the case within that portion of the 21st section of Act X. of 1859 which says "when an arrear of rent remains due from "any ryot at the end of the Bengalee year, "or *at the end of the month of Jeit of the* "*Fuslee or Velaity year*, as the case may "be, such ryot shall be liable to be ejected "from the land in respect of which the "arrear is due." But the defendant is the holder of a mokurruree istemraree ijarah, and not a *ryot*. It is, therefore, clear that his liability to be ejected from his tenure is to be determined by the conditions of his lease, and not by the provisions of the section above referred to.

Now, the right of re-entry reserved by the pottah, by which the defendant's tenure was created, can, under the express terms of that document, be exercised only when there is an arrear of rent due at the end of the year, the words used being "*Sal Tamamee Akheeree.*" It appears, however, that the present suit for ejectment was brought in the month of Assar, that is to say, more than two months previous to the expiration of the Velaity year, and the arrears claimed are admitted to be arrears due for the three previous months, namely, Jeit, Bysack, and Cheyt. Under such circumstances, it is clear that those arrears cannot be treated as arrears remaining due at the end of the year, and that the plaintiff's claim for ejectment, so far as it is based upon the non-payment thereof, must necessarily fall to the ground.

There is another point connected with the decree of the Lower Appellate Court with reference to which we wish to make a few remarks. It appears that the case was heard by that Court on the 21st December 1871, and a decree made in the plaintiff's favor in the following terms, namely:—"Appeal decreed with costs. The defendant "will be ejected unless the amount decreed "is paid within fifteen days of the date of "this order." Subsequently, but on what day and at whose request it does not appear from the record, the Judge amended the decree in the following terms: "Appeal "decreed with costs. The defendants will "be ejected unless the amount decreed, and "also the amount previously decreed, namely, Rs. 1, 389-7-1, is paid within fifteen days "from the date of this order." Now it is admitted by the respondent that this amendment was made in the absence of, and without any previous notice to, the defendant, appellant; and it is consequently clear that the Judge has acted contrary to the authority vested in him by law in amending the decree in the absence of the defendant, and thereby rendering him liable to be ejected for the non-payment of a sum of money which had not been included in the original decree passed against him. It is scarcely necessary for us to remark that an amendment of this description must be treated as contrary to law, and that the Judge was quite wrong in altering the decree in the manner in which he has altered it. Under these circumstances, the amended decree must be set aside.

The result of our decision is that the decree of the Lower Appellate Court, so far as it awards to the plaintiff the sum of Rs. 132-8, will stand, but that portion of the decree which directs the ejectment of the defendants will be set aside. We think, under the circumstances of this case, each party ought to pay his own costs in this Court as well as in both the lower Courts.

It has been brought to our notice that the defendant has been already ejected in execution of the decree passed against him by the Lower Appellate Court. This fact does not seem to be disputed by the respondent; and we, therefore, direct the Court which executed the decree to restore the defendant to possession, with mesne-profits from the date of ejectment to the date of such restoration.

The 21st March 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble J. B. Phear and W. Ainslie, *Judges*.

Execution-sales—Refund of Purchase-money—Voluntary Payments.

Case No. 189 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 27th May 1872.

Bissessur Lall Sahoo and another (Plaintiffs), *Appellants*,

versus

Ram Tuhul Singh and others (Defendants), *Respondents*.

Mr. G. H. P. Evans and *Baboos Mohesh Chunder Chowdhry* and *Unnoda Pershad Banerjee* for Appellants.

The Advocate-General, Mr. Chauntrell, and *Baboo Chunder Madhub Ghose* for Respondents.

In order to realize the amount of his decree against S caused the rights and interests of R in certain surplus proceeds of property sold for arrears of Government revenue (which surplus was in deposit with the Collector) to be attached and sold. Plaintiffs purchased the rights and interests in question for Rs. 8,000. This money they put into Court, and it was taken out by S and others in satisfaction of decrees against R. On plaintiffs applying for R's share in the surplus, they found that the sale for arrears of revenue had been set aside. They then sued for refund of the purchase-money with interest:

HELD, that the rule applicable to this case was that which is applied by Courts of Equity where vitiated sales are set aside, *viz.*, that, as the transaction ought never to have taken place, so the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction, and that the purchaser was in the position of a mortgagee, so far as he had made payments in consequence of the sale, and was entitled to recover his claim with interest.

It was also declared that, in the event of the appeal to the Privy Council against the order setting aside the Government sale proving successful, plaintiffs would not have any rights in consequence.

Obiter dicta.—The plaintiffs ought to have been made parties to the suit for setting aside the Government sale.

The rule stated in Addison on Contracts as to "voluntary payments" would not apply to this case; plaintiffs' payment having been not voluntary but on account of the purchase.

Couch, C.J.—In this case the plaintiffs sought to recover from the defendants Rs. 11,714-10-8 for principal and interest of money which they had paid upon a sale to them on the 18th of February 1868. Their case was, that Sheo Pershad Singh, who is dead, and is represented in this suit by the second defendant, having got a decree against the first defendant, Ram Tuhul Singh, in order to realize the amount, caused the rights and interests of Ram Tuhul Singh in certain surplus proceeds of property which had been sold by auction for arrears of Government revenue, and after sanction and confirmation of the sale, was held in deposit by the Collector in the name of Ram Tuhul Singh and his co-sharers, to be attached and sold on the 18th February 1868; that the plaintiffs purchased those rights and interests for Rs. 8,000 in the name of Juldharee Pandah; that, the money being put into Court, and the sale confirmed, Rs. 4,970-9-3½ was taken out by Sheo Pershad Singh on account of his decree, and the remainder by other decree-holders who have been made parties to the suit, and are the third, fourth, and fifth defendants; and that, upon the plaintiffs applying to the Collector to make over to them the sum of Rs. 35,520-14, the share of Ram Tuhul Singh in the surplus money, their application was rejected on the ground that the sale for arrears of Government revenue had been set aside. This is the fact; and it is stated that the decision of this Court setting it aside is now under appeal to Her Majesty in Council.

The case in 4 Bengal Law Reports, page 11, Full Bench Rulings,* is different from the present, and the decision there does not, we think, apply to it. There the plaintiff had lost the property which he had bought in consequence of its being found that the judgment-debtor had no title whatever to it, a third person having recovered it by showing that he was the person lawfully entitled to it. In the present case, the loss to the plaintiff was caused, not by the judgment-debtor having no title to the property, but by his asserting his title, and by virtue of it getting the sale set aside. He has obtained a decree of this Court by which he has recovered the property, and if the plaintiffs do not succeed in the present suit, he will not only keep it, but will get debts to the amount of Rs. 8,000, for which his property was liable to be attached and sold, paid with the plaintiff's money.

We think the rule that ought to be applied in this case is that which is applied by Courts of Equity where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale. Lord Cottenham, in Bellamy *vs.* Sabine, 2 Phillips, page 425, says as to such cases: "The Court proceeds upon the

* Sowdaminee Chowdhrain *vs.* Kishen Kishore Poddar, 12 W.R., Full Bench, 8.

"ground that, as the transaction ought never "to have taken place, so the rights of the "parties are, as far as possible, to be "placed in the situation in which they would "have stood if there had never been any "such transaction" That rule is applied by him in the case quoted to the setting aside a conveyance on account of fraud and ordering a re-conveyance. If in such a case the purchaser is to have back his purchase-money, it is equitable that he should in the present case. The rule is also applied where an annuity is set aside on account of a defect in the memorial; an account is taken, and the defendant, the purchaser of the annuity, is allowed his principal and interest and costs. The remark of the Subordinate Judge, in regard to the nature of this purchase by the plaintiff, might, in many cases, be applied to the purchase of an annuity frequently a very speculative transaction. There is also another instance which may be mentioned in the case of Belcher *vs.* Vardon, 2 Collyers, page 175, where securities were set aside on account of usury at the instance of the assignees of a bankrupt. In that case the defendant had leave to prove for his advances with legal interest. We are of opinion that the rule ought to be applied in the present case, and that the plaintiffs are entitled to be restored to the position in which they would have been if the sale for the Government revenue had not taken place. It is a mistake to apply to a case like the present the rule stated in Addison on Contracts as to voluntary payments. The payment here was not voluntary, it was made on account of the purchase, and is not to be regarded as a voluntary payment. It is true that the plaintiffs were not parties to the sale and purchase which was set aside. They bought the interest in the surplus, but the consequence of the judgment-debtor succeeding in setting aside the Government sale was to obliterate the surplus, and prevent the plaintiffs from getting any part from it. We think the proper course would have been to have made the present plaintiffs parties to the suit for setting aside the Government sale, if the purchase by the plaintiffs was confirmed before the hearing of the suit, as they had an interest in the sale not being set aside, and would be affected by the result. It does not appear when the suit for setting aside the sale was heard. If they had been parties to that suit, the Court, in making the decree setting aside the sale, ought and it must be presumed would have directed that it should be set aside upon the plaintiff therein paying to the present plaintiffs the money which they had paid. Lord Cottenham says in the passage which follows the one we have quoted: "In setting aside sales of this kind, the Court considers the purchaser as in the situation of a mortgagee, so far as he has made payments in consequence of the sale." On that ground, therefore, we think the plaintiffs are entitled to succeed in the present suit, and to recover what they have claimed for the principal money and interest.

In consequence of an appeal being now pending in the Privy Council, it is necessary to declare that, should it be successful, and the decree of this Court be reversed, and the sale for arrears of revenue stand good, the present plaintiffs are not to have any rights whatever in consequence of it. By bringing this suit, they elect to consider the sale as set aside, and to have back their purchase-money.

Having made their election, and treated the sale as set aside, they cannot take advantage of any decision that may be made by the Privy Council reversing that. They must abide by what they now ask for, and the sale, so far as they are concerned, must be treated as finally set aside.

Then the next question to be considered is in regard to the costs. The plaintiffs have shown that they are entitled to succeed in the suit, and the person who is liable to pay the money is the first defendant, Rai Tuhul Singh, and he ought to pay the plaintiffs' costs of the suit.

As to the second defendant, the representative of Sheo Pershad Singh, he attached the surplus in the hands of the Collector, which he had the right to do, but then he ought to have ascertained whether, instead of putting up to sale the share of the surplus, which seems to have amounted to more than Rs. 35,000, he could not have obtained an order to have the amount which was due to him, Rs. 4,970-9-3½, paid to him. His conduct appears to be such that he ought not to receive his costs, but ought to be made to pay them himself.

As to the third, fourth, fifth, and sixth defendants, namely, the other decree-holders who were paid out of what remained of the purchase-money paid by the plaintiffs after satisfying Sheo Pershad Singh, they do not appear deserving of any blame. They received their money from the Court out of what remained after satisfying the attaching creditor, and they ought not to have been

nade parties to the suit. The plaintiffs nust, therefore, pay their costs.

There will be a decree accordingly, and he plaintiffs will recover from the first efendant the amount claimed with costs.

The 25th March 1873.

Present:

ir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

ale of Mortgaged Property—Rights of Purchaser—Enhancement of Rent—Exemption—Regulation VIII. of 1793, s. 51—Ryotty Kudeemee Tenures—Findings of Fact—Interference by Privy Council—Pottahs—Title—Notices—Substituted Service.

*n Appeal from the High Court of Judicature at Fort William in Bengal.**

Ram Chunder Dutt

versus

Jughesh Chunder Dutt, heir of Romesh Chunder Dutt.

The purchaser at a sale under a decree by which a mindary is ordered to be sold, in a suit by a mortgee, can have no higher title to enhance the rent of ryots than he would have had if he had been a purser from the former zemindar.

claim to exemption resting upon the ground of a re being ryotty kudeemee does not fall within Regun VIII. of 1793, s. 51, which relates to dependent okdars properly so called.

pottah may be a confirmatory grant only; and there thing in accepting such a grant inconsistent with presumption that a prior title existed.

cases of substituted service, it is not sufficient to that the notice has been attached to the door, unthe condition which renders such a mode of service d, namely, that the person who ought to be served is ing out of the way, has been first established to satisfaction of the Court.

THIS was a suit brought by Romesh Chun Dutt, who claimed to be the zemindar of emindary called Lot Porooe, his title restupon a purchase at a sale by a master he late Supreme Court, under a decree which the zemindary was ordered to be d in a suit by the mortgagee. The present was brought to enhance the rent of the ellant, treating his tenure as one in ch the rent was enhanceable. Romesh nder Dutt, as purchaser at the sale to ch reference has been made, can have no her title to enhance the rent than he ld have had if he had been a purchaser from the former zemindar. The sale was not for Government revenue, and the title of the purchaser under it was no higher or better than it would have been under a conveyance direct from the zemindar. Therefore, the question comes to this, whether the respondent, as zemindar, had, as against the defendant in the suit, the right to enhance the rent.

The defence made to the suit is, first, that there was no notice to enhance, upon which some observations will hereafter be made, but the principal defence is, that there was no right to enhance, based upon the contention that the lands of the defendant were held on kudeemee ryotty tenure. It was further alleged that that tenure had been confirmed by a former zemindar by the grant of a pottah which, as it was said on the part of the defendant, was confirmatory only, and not a new grant. But the foundation of the case which has been put forward to exempt this land from an enhanced rent is, that it was held on a kudeemee tenure which had existed more than twelve years before the decennial settlement.

The first question which arises is upon whom the onus of proof lies? Mr. Cowie contended that, upon the general principle running through the relations of landlord and tenant in Bengal, the liability to enhancement was the rule, and that those who sought to escape enhancement must prove their exemption. On the other hand, it was said by Mr. Leith that this case fell within section 51 of Regulation VIII. of 1793, and that it lay upon the zemindar to bring the case within some of the conditions mentioned in that section. Their Lordships are disposed to think that this claim to exemption being rested upon the ground that the tenure was ryotty kudeemee tenure does not fall within the 51st section, which relates to dependent talookdars properly so called; and they are not prepared to affirm what was said by the Judges in the case to which reference has been made, Rajkishen Roy *vs.* Bydonath Nundee, in the Sudder Dewanny Adawlut Reports for the year 1858, page 902. It is there stated: "We think the analogy of the "law, section 51, extends to kudeemee ryots, "which the defendants are." Now, arguments from analogy may arise where a principle of law is involved; but where the Courts are dealing with the positive enactments of a Statute, reasons founded upon analogies are scarcely applicable. However, assuming in this case that it lay upon the defendant in the suit to establish his claim

*From the judgment of C. Steer and E. Jackson, in Regular Appeal No. 2604 of 1864, decided June 1865, 2 W. R., Act X. Rul., 47.

to exemption, their Lordships have come to the conclusion that he has sustained the burden of proof cast upon him, and established a case which entitles him to be exempted from enhancement.

The earliest evidence which has been given is the proof of certain receipts for rent, of a date as long ago as the year 1771. There are receipts of that year which show that some of these lands were held by ryots at that date, paying the identical rent which has ever since been paid—that is, upwards of a century. These receipts, however, cover a part only of the lands in question, *viz.*, the lands in Bashoodebpore; and there are lands in three other mouzahs which are not included within them. With regard, however, to these lands they are all included in a jummabundee made as early as the year 1783, apparently for the purpose of the decennial settlement, which took place about 1790. That jummabundee, made seven years only before the decennial settlement, may not be sufficient in itself; it does not afford direct evidence in itself to satisfy the requirements of the law, that to escape enhancement there should have been a fixed rent for more than twelve years before the decennial settlement. But at the distance of time at which we are now arrived from the date of that settlement, it becomes absolutely necessary, for the purposes of justice and equity, that presumptions should be made. It may be that the jummabundee alone would be insufficient to found a presumption that these tenures were ancient tenures, and that this rent had existed for twelve years before the decennial settlement. But this case does not rest upon the jummabundee alone; the subsequent evidence which has been given in the cause, supports very strongly the presumption that these tenures were ancient at the time of the settlement; how ancient, it is impossible to say. It seems that the lands now held by the defendant had been divided into small jotes or holdings, and had been held by numerous tenants, whose names are found in the old receipts and the jummabundee to which reference has been made, and the rents there appearing are the same which have ever since been paid. These tenants from time to time sold their jotes, and they were purchased by a gentleman of the name of Tara Chand Bundhopadhya, to the extent of 236 beeghas. Tara Chand having thus acquired the property, sold it to those under whom the present defendant claims, and at the time of that sale some transactions took place between Tara Chand and the purchaser, to which the zemindar was a party. Their Lordships are of opinion that those transactions in the strongest way confirm the presumption that the lands at that time were held under an old tenure.

It appears that Eshan Chunder Chuttopadhya, who was then the zemindar, had become surety for Tara Chand, and that in order to relieve himself from the consequences, and also to obtain payment of a thousand rupees which Tara Chand owed to him, he became "the medium," as he himself says in his ikrar, of the sale from Tara Chand to Ram Chunder Dutt. But before that sale took place, there were some disputes respecting the property and the rent; and it was to show his acquiescence in the sale and to prove that all those disputes were at an end that Eshan Chunder, the zemindar, gave an ikrar or agreement to Ram Chunder Dutt, the purchaser.

This ikrar bears date the 27th Maugh 1238; it was registered on the 25th November, A.D. 1832, and its terms are most important. The zemindar refers to his having given security, and that Ram Chunder Dutt had become the purchaser of the tenures by ten deeds of sale for a consideration of Rs. 10,078; that he had himself obtained a thousand rupees in satisfaction of the money due to him, and had been relieved from the liability which he was under as surety of Tara Chand. Then the most important part follows. The ikrar says: "But a dispute about "mutation of names having arisen between "you and ourselves, you filed a petition "against us in the Civil Court of Zillah "'Howalee Shahur' (suburbs of the town of "Calcutta, and a perwana was issued calling "for an answer from us. Thereupon we "gave a pottah to you after settling the rent "according to the jummabundee by mutation "of names." When the zemindar refers to settling the rent according to the jummabundee, he was aware of the conveyances which had been made by Tara Chand to Ram Chunder—conveyances which describe not an ordinary holding of a ryot, but something much more, a tenure which was of value, and hereditary.

The deeds of sale are set out, and are substantially to the same effect. In the part which relates to the sale there are the words: "I sell to you the said lands for "consideration of Rs. 2,255, which has "been received by me in full and in cash. "You taking possession of these lands in "manner held by me, and causing your name

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"to be entered in the zemindar's sherishta by "expunging my name, and paying the rents "according to the jummabundee, continue to "enjoy them happily, heir after heir. The "power to sell those lands, or give away in "gift, rests with you." These were deeds to which the zemindar was privy. He was, therefore, aware that the sale was of a tenure which was to be held by the purchaser and his heirs, heir after heir, at rents according to the jummabundee; not any new rents, but rents according to the jummabundee of 1783, under which the decennial settlement had been made. Now, with the knowledge of those conveyances, the zemindar, in his ikrar, says this: "Thereupon we gave a pottah to "you, after settling the rents according to "the jummabundee, by mutation of names." Why should he have acceded, in the year A.D. 1831, to a settlement of rents according to the old jummabundee of 1783 if there had been at that time a power on his part to enhance? A very long time had elapsed since the settlement, and it can hardly be supposed that the value of the lands had remained the same. There is also the strong fact, which was brought to his knowledge, that the large sum of upwards of Rs. 10,000 had been given for these very lands, which, upon the hypothesis of the respondent, must have been immediately afterwards enhanceable by the zemindar himself.

Their Lordships think the above transaction, evidenced by the ikrar and the deeds of sale, affords very strong evidence of an acknowledgment on the part of the zemindar that the lands were held as ancient tenures. Reference is made by this ikrar to a pottah, and there can be no doubt that a pottah of the kind was executed at that time by the zemindar. Well, the appellant has produced a pottah, which, he says, is that which was granted, and on the face of it, it certainly accords with the ikrar, and with the rest of the evidence in the case; and if this be an old tenure, this pottah is entirely consistent with it. Confirmatory pottahs are common in India; and this pottah, if it really is made in the terms of that produced by the appellant, must be taken to be confirmatory of the tenure which then existed.

But it was said that this pottah is not genuine, and undoubtedly the Courts below, the Principal Sudder Ameen and the Zillah Judge, have so found. It is not usual, and certainly it is not the desire of their Lordships to interfere with the concurrent findings of the Courts below upon a question of fact, where the case depends entirely upon such a question; but where it becomes necessary in the course of an appeal involving other questions for their Lordships to consider all the evidence, it may be essential that they should decide for themselves whether a particular document is a genuine one, or a particular fact exists one way or the other, for the purpose of satisfactorily disposing of the appeal. Their Lordships desire to say with regard to this pottah that they are not fully satisfied with the reasons on which it was rejected by the Courts below. They cannot but think that great weight is due to the evidence of the zemindar, Eshan Chunder; for although he was unable from his blindness to see the document, yet when it was read over to him, he gave, without hesitation, his opinion that it was the pottah he had granted. It was an important pottah, not likely to have escaped his recollection; and whether he recollected all the terms of it or not is immaterial, when he had the impression on his mind, if he is speaking the truth, that he had granted a confirmatory pottah of the mourosee rights of the tenants. However, their Lordships are of opinion that, even without the pottah, the evidence is sufficient to support the contention on the part of the appellant, namely, that these were old tenures in the nature of kudeemee tenures existing more than twelve years before the decennial settlement, and therefore not liable to enhancement on the part of the zemindar.

With regard to the 26 beeghas not included in the deeds of sale from Tara Chand, their Lordships think that the evidence proves, without the aid of these deeds, that they were kudeemee tenures of the same nature as those on which the larger quantity was held.

With regard to the judgment on the special appeal, their Lordships find that the High Court did not go into the evidence to ascertain whether there was an ancient tenure which might establish freedom from enhancement, although the pottah, which the Courts below had declared not to be proved, had never existed. No doubt the High Court was limited on the special appeal to the consideration of the law; they were obliged to assume that the pottah, which had been found not to be genuine, was a document which could confer no title. But they appear to have founded their judgment upon the assumption, either that the case had been put upon the pottah, and that no other case had been made, or that Ram Chunder Dutt, by accepting a pottah, had, as it were, attorned to the zemindar under that pottah,

and acknowledged that he had no older title. Their Lordships think that is not the correct view. They have already said that, in their opinion, a pottah may be a confirmatory grant only, and that there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed. It seems to have scarcely been a sufficient reason for not going into the early title that Ram Chunder Dutt had taken a pottah, the terms of which the High Court were unable to ascertain.

Upon these grounds their Lordships think that the judgments of the Courts below must be reversed.

The conclusion at which their Lordships have arrived upon the right to enhance renders it unnecessary to determine whether the notice was properly served or not. It appears that the Principal Sudder Ameen and the Zillah Judge differed upon that point, the first Judge finding that the notice was not well served, the second that it was. Their Lordships desire to say that they have great doubt whether the evidence sufficiently shows that the notice was properly served. If it had been necessary to determine that point, the evidence must have been narrowly looked at to see if any presumption could have been raised that Ram Chunder Dutt was keeping out of the way at the time that it was attached to his door. Their Lordships are of opinion that in cases of substituted service, that is, service substituted for the personal service which the Statute requires wherever it is practicable, the Courts should take care to be satisfied that the condition, on which alone substituted service is good, exists, namely, that the person who ought to be served personally is keeping out of the way. It will not be sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good has been first established to the satisfaction of the Court.

In the result, their Lordships will humbly advise Her Majesty to reverse the decrees of the Courts below, and to direct that the suit should be dismissed, and that the appellant should have his costs in the Courts in India, and of this appeal.

The 27th March 1873.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Lord Justice Mellish, Sir Robert P. Collier, and Sir Lawrence Peel.

Joint Hindoo Family—Rights of Auction-purchasers at a Sale in Execution of a Decree against one Member—Construction of s. 260, Act VIII. of 1859.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Bodh Sing Doodhooria and another

versus

Guneschunder Sen and others.

HELD that the provisions of Act VIII. of 1859, s. 260, were designed to check the practice of making *benami* purchases at execution-sales, *i. e.*, transactions in which one party secretly purchases on his own account in the name of another party. They cannot be taken to affect the rights of members of a joint Hindoo family, who by the operation of law are entitled to treat as part of the common property an acquisition, howsoever made, by a member in his sole name, if made by the use of the family-funds.

THIS was an appeal from a judgment of the High Court at Calcutta affirming two judgments of the Principal Sudder Ameen of Moorshedabad.

On the 30th of August 1865, Brojomohun Sen (the father of Guneschunder Sen) and the other respondents brought a suit against the appellants and other parties claiming certain properties, among them an estate called Cossipore. This suit was subsequently divided into four. The plaint was declared to relate to Cossipore only, and the appellant (Bodh Sing) was made sole defendant. A other plaint was filed against both appellants by the same plaintiffs, claiming an estate called Shahjehanpore. The same issues were settled in both suits.

On the 20th February 1867, the Principal Sudder Ameen gave judgment on the Cossipore suit in favor of the plaintiffs, and on the same day he gave judgment in the Shahjehanpore suit also in favor of the plaintiffs. On the 29th of June 1868, Mr. Justice Loch and Mr. Justice Glover gave one judgment in the two suits on appeal, but separate decrees were passed affirming the judgments and decrees of the Principal Sudder Ameen.

The other facts appear sufficiently from the judgment of the Judicial Committee.

Mr. Leith, Q.C., and *Mr. Doyne* for the Appellants.

Mr. Cowie, Q.C., and *Mr. John Cook* for the Respondents.

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* From the judgment of Loch and Glover, JJ., in Regular Appeals, Nos. 250 and 251 of 1867, dated 29th June 1868.

Sir *James Colvile* delivered the following gment:—

On the 21st of November 1864, the pellants became the purchasers, at an exe-ion-sale, of the right, title, and interest of Ramsoondur Sen in two distinct estates, ., Shahjehanpore and Cossipore. Both been attached by one Indurchunder Doo-r in execution of a decree which he had ained against the representatives of Ram-ndur in a suit commenced against that son in his lifetime for what is admitted to e been his separate debt. The price paid the appellants would have been adequate he judgment-debtor had been the sole er of the properties purchased. In ust 1865, the respondents, representing nselves to be the persons who jointly the sons of Ramsoondur, his brother mchunder, and one Benoderam Sen con-ted a joint and undivided Hindoo family, alleging that the properties so purchased ed part of the joint estate of that family, ght the suits out of which this appeal arisen, in order to recover both estates us the assumed shares of Benoderam, soondur, and Ramchunder therein. the first question for their Lordships' rmination is, whether there are sufficient nds for disturbing the conclusion to ch both the Indian Courts have come, , that the properties in dispute were, in , part of the joint family-estate.

It is not disputed that Ramsoondur was a mber of this joint and undivided family. e *status*, however, of the family was uliar. Mr. Justice Loch says (and ther party has disputed the accuracy of description): "The evidence of the wit-ses and of those members of the family o have been examined clearly shows that, ugh the family were joint in food, and at ticular seasons of the year lived together the family dwelling-house at Koredha, y also had separate dealings and funds of ir own. The facts thus brought to our ention render it impossible for us to look on the family as a joint Hindoo family in e ordinary sense of the term, that is, as a mily having all things in common; all quisitions being made from the joint funds the family, and all members being entitled share in the benefits of any property held the name of any member of the family. It clear to us from the evidence that, while e family have some ancestral property in int possession, some of the members of the mily acquired separate property from their n funds, and dealt with it as their own without reference to the other members of the family." Such a state of things may, in their Lordships' judgment, be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindoo Law as to property in the name of one member of a joint family, and to throw upon those who claim, as joint property, that of which they have allowed their co-parcener, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence. There can be no doubt that, if the evidence adduced by the respondents, the plaintiffs in the suit, be believed, there is enough to prove their case. And both of the Indian Courts have found in their favor. The two Courts have, however, differed considerably in their appreciation of parts of the evidence; and the decision of the High Court is based upon narrower grounds than that of the Principal Sudder Ameen.

The following are undisputed facts concerning the two estates: Shahjehanpore, or at least that portion of it which is in question in this suit, was the zemindary of one Rajah Soorjnarain Sing. At various dates before 1859 he had granted a putnee of part, and several ijaras of other parts, of this estate in the name of Ramsoondur, and had assigned the rents reserved by these ijaras, by way of security for certain advances ostensibly made to him by other members of Ramsoondur's family. On the 4th of July 1859, the zemindary, which has been attached at the suit of other creditors, was put up for sale, and was knocked down to Ramsoondur as the highest bidder. He was afterwards put into possession of it, and from that time until the date of his death his name stood in the Collector's register as that of the sole registered proprietor. It has been admitted at the bar that there is no question in this suit touching the putnee or other interests acquired in the name of Ramsoondur before this execution-sale. The only question is, whether the zemindary interest, which was then sold, became, by virtue of that sale, the separate property of Ramsoondur, or part of the joint property of the family.

Of Cossipore, a four-anna share belonged to one Kissoreemonee Dossee, the remaining twelve annas standing in the name of Shibram Dey, who has been called as a witness in the cause. In 1855 the four-anna share was purchased in the sole name of Ramsooodur Sen, and on his petition his name was substituted for that of the vendor as the proprietor of this share in the Collector's book.

In April 1856, the interest of Shibram Dey was, on the suggestion that it had been purchased by Ramsoondur, also transferred into his name, and he was thenceforward, until the time of his death, the sole registered proprietor of the whole property.

Ramsoondur died in December 1863, pending the suit in which the execution, which is the foundation of the appellant's title, issued, but before judgment has been recovered therein. He left as his heirs two infant sons, and on the 15th of January 1863, his brother, Ramchunder, obtained a certificate of administration under Acts XL. of 1858 and XXVII. of 1860, empowering him to manage the estate of the deceased. In his application for this certificate, Ramchunder had stated that his brother's property, in debts, zemindaree, trade, cash, and Company's paper, was worth about Rs. 50,000. On the same 15th of January, Benoderam Sen, the eldest member and manager of the joint family, presented two petitions to the Collector of zillah Moorshedabad, praying in the one that Shahjehanpore, in the other, that Cossipore, might be transferred into his name, on the allegation that each had been purchased by him in the name of Ramsoondur, and therefore that he was the true owner thereof. In February 1863 Ramchunder, as manager of Ramsoondur's estate, filed petitions admitting the title of Benoderam; and on the 26th of May 1863 orders were made that the name of Benoderam should be recorded instead of that of Ramsoondur as that of the proprietor of both estates.

In June 1863 judgment was recovered against the estate of Ramsoondur in the suit of Inderchunder Doogur, and both estates were afterwards attached as part of the property of the judgment-debtor. It follows, from what has been just stated, that both when so attached stood in the name of Benoderam.

Thereupon Benoderam came in to set aside the attachments. His claims were dealt with separately according to the provisions of the 246th section of the Code of Civil Procedure. In each case he claimed to be the sole proprietor of the whole estate, and as such entitled to have the attachment removed. Both claims were dismissed by separate orders, dated the 20th of September 1864, which directed the property claimed to be sold. The usual proclamations of sale were made on the 23rd of September, and the execution-sale took place on the 21st of November 1864.

It may be well, before considering the grounds upon which the two Indian Courts have held the estates in question to be the property of the joint family, to dispose of a point taken by the appellants, which applies only to Shahjehanpore. The appellants contend that, whatever be the weight of the evidence as to the real nature of the purchase, the title of Ramsoondur to this estate as his separate property must prevail, by reason of his having purchased it at an execution-sale held after Act VIII. of 1859 (the Code of Civil Procedure) had come into operation; and by force of the 260th section of that Statute, which provides that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." Their Lordships will not inquire whether there is sufficient proof that Ramsoondur, who purchased at an auction-sale held a few days after the Act came into operation, did obtain a certificate under the Act, or of its terms, if he did obtain one; because, assuming him to have been the certified purchaser within the meaning of the Act, they are of opinion that the provisions of the section do not apply to such a case as the present. They were designed to check the practice of making what are known as benamee purchases at execution-sales, *i.e.*, transactions in which A secretly purchases on his own account in the name of B. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindoo family who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of the common property an acquisition, howsoever made, by a member of the family in his own name, if made by the use of the family funds.

It need hardly be observed that, on the trial of the issue now under consideration the principal fact to be ascertained was the source from which the purchase-money for the property in question was derived, *i.e.*, whether it came from the common family chest at Koredha in Beerbhoom, or from the separate funds of Ramsoondur employed by him in carrying on his business, admitted to be separate, at Khagra near Moorshedabad. The evidence adduced by the respondents in support of their claim consisted mainly of a large body of oral testimony; and certain books and accounts kept at the family house at Koredha, being part of the joint

amily accounts; of the separate books and ccounts of Ramsoondur kept at Khagra; nd of letters purporting to be letters which ad passed between him and Ramkristo, the on of Benoderam, being together at Khagra, n the one side, Benoderam residing at Koredha, on the other. The Principal udder Ameen treating the whole of this vidence, whether oral or documentary, as rustworthy, came to the conclusion that the laintiffs had established their case. The udges of the High Court appear to have nsidered that the letters on which the rincipal Sudder Ameen had relied were ot admissible in evidence against the efendants (the appellants); to have found asons for discrediting the accounts; but to ve held that, nevertheless, the finding of e lower Court was capable of being pported upon the oral testimony viewed by e light cast upon it by the conduct of the rties.

If it were clear that the Judges of the gh Court were right in rejecting the letters, d in treating the accounts as untrustworthy, e correctness of their finding would, no ubt, have to be determined by the sufficicy of the grounds on which they have restit. Even in that case their Lordships, ough unable to adopt the inference which e learned Judges have drawn from the conct of Ramchunder and Benoderam, or algether to concur in other parts of their asoning, would have felt great difficulty disturbing their finding, inasmuch as both urts are agreed as to the credibility of the aintiffs' witnesses. Their Lordships, hower, are of opinion that the letters, if oved as the Principal Sudder Ameen has nd them to have been, were clearly missible in evidence against the appellants o claim under Ramchunder.

It was said that the Judges of the High urt have treated these letters as not duly oven. But it appears to their Lordships at those learned Judges, thinking that the cuments would not, if proved, be admisle against the appellants, never addressed eir minds to the sufficiency of the proof. e judgment on that point of the Principal dder Ameen (a native Judge), dealing with ters in the native character, and purport to have passed between natives, is, in eir Lordships' opinion, of very great ght. The letters, moreover, afford inal evidence that they have not been ncocted for the purposes of this suit. d since those with which Ramchunder been directly connected by proof of handwriting or otherwise clearly show that he and Ramkristo were acting jointly on behalf of the family in the purchase of Shahjehanpore, the letters of Ramkristo written in the course of the same transaction seem to be also admissible; and the whole correspondence affords the strongest confirmation of the statements made by the plaintiffs' witnesses.

Again, their Lordships are not satisfied that the objections taken by the Judges of the High Court to the accounts are such as ought to deprive them of the credit which the Principal Sudder Ameen (possibly a more competent Judge of native books of account than any European can be) gave to them. A distinction is no doubt to be taken between those accounts. The family accounts, taken by themselves, are admissible only as corroborative evidence. But the private accounts of Ramsoondur produced by his brother from the Khagra Kotee may, if genuine, be direct evidence, in the nature of admissions on his part against the appellants. There are entries in the latter which strongly support the plaintiff's title. And these are not open to some of the objections taken by the High Court to the family accounts, particularly to one which, their Lordships may observe, they do not consider to be by any means conclusive, *viz.*, one to the effect that the last-mentioned accounts, or some of them, were produced by Benoderam in support of his claims to the sole ownership of the estates. Ramsoondur's grant to Surasuttee Dabee, at page 698 of the record, also affords some corroboration of the plaintiff's case as to Shahjehanpore.

Regarding Cossipore, it may be observed that, although much of the plaintiffs' documentary evidence and in particular the letters have no bearing on the claim to this estate, the direct evidence of its having been acquired as part of the joint family-property is stronger than that relating to Shahjehanpore. Shibram Dey, who has been treated by both Courts as a witness deserving of credit, has distinctly sworn that the twelve-anna share in this estate which once stood in his name was purchased in his name with the family-funds, and on account of the family; and that no consideration passed when it was transferred from his name into that of Ramsoondur. The High Court has found that, before this benamee purchase, the family was interested as putneedars in this estate; and every probability is, therefore, in favor of the conclusion that the direct evidence given to prove that the purchase

of the other four-anna share in the estate was also a family-transaction is true.

Their Lordships are of opinion that the evidence so given on the part of the plaintiffs is too strong to be outweighed by the inferences to be drawn from the conduct of Benoderam and Ramsoondur in the matter of the claims advanced by the former, or from the conduct of the family in allowing Ramsoondur, on the occasion of giving security to the Collector, to state that these properties belonged to himself without co-sharers. Their Lordships will afterwards consider how far the representations involved in these last-mentioned transactions (if false) affect the right of the plaintiffs to succeed in this suit. In determining whether, in point of fact, the property was joint or separate, they can only be treated as in the nature of admissions inconsistent with the title now asserted; and viewed in that light, they do not seem to their Lordships materially to impair the strength of the case made by the plaintiffs.

On the whole, then, their Lordships, after full consideration of the arguments for the appellants, and notwithstanding the omission to call or account for Ramkristo, have come to the conclusion that the finding of the two Indian Courts to the effect that both estates were purchased with joint family-funds, and became joint family-property, ought to be affirmed.

If this be so, the next question to be considered is, whether the plaintiffs have forfeited their right to assert their title against the appellants by reason of their own conduct, or the acts of any of those with whom they are connected.

Those who set up such a defence are bound to show clearly both the facts on which it is founded, and that the legal consequences on which they insist necessarily flow from those facts. In the course of the argument there was some want of precision upon this point.

The mere fact that Ramsoondur, when trading on his separate account, was permitted by the family to appear to the world as the sole owner of the estates, and so, perhaps, to obtain a fictitious credit, can be no foundation for such a defence. It may be an unfortunate consequence of the Hindoo law touching the joint and separate property of members of an undivided family, but it is one of which all who deal with a Hindoo trader must take their chance. Nor can greater effect be given to the misrepresentation made by Ramsoondur, probably with the concurrence of the adult members of his family, when he gave security to the Collector. Such a misrepresentation might possibly have been used as an estoppel against the family, had any question in respect of the security arisen between them and the Collector. But it has no bearing upon the present suit except as an admission, in which light it has been already considered, or as an instance of tortuous dealing, which affects the general credit due to the plaintiffs. It was not upon the faith of that representation that the appellant purchased.

The foundation, therefore, of the defence is to be found, if anywhere, in the acts done after Ramsoondur's death, and before the sale.

The first of these was the transfer of the estates into the sole name of Benoderam, on his application, and with the consent of Ramchunder. Their Lordships think it desirable, before considering its effect, to state their view of the nature of this transaction. They cannot but regard it as a contrivance, between Benoderam and Ramsoondur at least, to put the estates beyond the reach of Ramsoondur's creditors, and therefore fraudulent as against those creditors. They do not impute to Benoderam or to Ramchunder any intention to defraud either the children of Ramsoondur or any other member of the joint family. But Ramsoondur was known to have died indebted; judgments against his estate, if not actually recovered, were imminent, and the only practicable mode of putting these properties wholly beyond the reach of his creditors was by treating them, not as family property in which he would have a seizable interest, but as the property of Benoderam alone. In furtherance of this scheme Benoderam, when the estates were attached, filed his claims. If those claims had been successful, the attachment would have been removed, and this execution altogether defeated. If, on the other hand, a claim had been made, according to the truth, on the ground that the estates were joint family property, the execution must have gone on though with notice to all concerned that such a claim had been made. The dismissal of Benoderam's claims became final by his failure to bring a suit to establish his alleged rights within one year from the date of the orders. But the orders themselves do not state the precise grounds of dismissal; and though they negative the title set up by Benoderam, they in no way affirm that Ramsoondur was the sole owner of the properties. And the depositions of the three witnesses from page 412 to 416 of the

d show pretty clearly that the case made e decree-holders in resisting Benode- s claim to Shahjehanpore was rather that estate was family-property in which oondur had an interest as co-parcener, that it belonged to him alone.

w then do these proceedings affect the of the plaintiffs to assert against the lants the title to the estates which they been shown to possess. They might be ed, if it were shown that they had ented Ramsoondur to be the sole of the estates; and that the appel- had purchased on the faith of that entation. But it is impossible from roceedings in question to extract any misrepresentation, even if the plaint- the record are to be held to be bound ry act and statement of Benoderam.

in, is their right affected because, when eram put forward a false claim, they ot formally prefer the true one? is nothing in the Code of Procedure made it imperative on them to do the claim, if made, could not have d the execution-sale altogether.

highest ground on which the appel- n put their case is, that Benoderam them by his fraudulent attempt to the execution; and that the whole is bound by his acts. It is not neces- decide how far Benoderam and Ram- er, who are not parties to this suit, be affected individually by these pro- gs, if they were suing to recover their tive shares. On the present record it be held that their shares have passed d are now vested in, the appellants. Lordships have felt some doubt er the respondents, suing as members Hindoo family, still joint and undivid- r property which, if recovered, will nably again fall into the common of that family, might not have been to be bound by the acts of Benoderam, er of omission or commission, and sible for the consequences of them. ey are of opinion that a defence in- d to be founded on such a joint respon- y should be far more clearly pleaded roved than it has been in this case. far the plaintiffs on the record have parties to, or are affected in law by, eram's proceedings, and to what extent, all, the appellants were misled by proceedings, are questions which have been fairly raised or tried in the s below. This was so found, and as their Lordships think, correctly found, by the Principal Sudder Ameen.

Their Lordships are, therefore, of opinion that the second point taken by the learned Counsel for the appellant is no answer to the suit, and they must humbly advise Her Majesty to affirm the decrees under appeal, and to dismiss this appeal with costs.

Agents for the Appellants: *J.* and *J. Hopgood.*

Agents for the Respondents: *Barrow* and *Barton.*

The 2nd April 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Local Investigations—Thakbust Proceedings—Boundary Disputes.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Protab Chunder Burrooah

versus

Ranee Surnomoyee and others.

The question to be decided was whether certain plots, delineated on a map, belonged to appellant's zemindary, or to that of respondent, in whose possession they had been since 1852, when in certain thakbust proceedings they were determined to lie within his estate of Bahur Bund in Zillah Rungpore, and not within appellant's estate in Zillah Goalparah. Appellant sued to impeach the thakbust award, and to recover possession. In the course of litigation, the case was remanded by the High Court upon the issue, which of two given lines was the old bed of the river Sunkosh, when a Sudder Ameen was deputed to make a local investigation which proved to be in favor of appellant. The case was finally dismissed by the High Court in appeal.

The Privy Council HELD that the report of the Sudder Ameen failed to establish the line of the old Sunkosh, and that, even if it had embodied conclusions from what had been found and observed on the ground, it would be reasonable to prefer the thakbust proceedings which were an earlier local investigation, since which the features of the locality may have changed, and evidence of possession lost.

THE question which their Lordships have to determine on this appeal is whether the plots Nos. 1, 2, 3, and 4 of chur land delineated on the map, which, in the judgments of the Courts below and throughout the argument at the bar, has been called map No. 3, belong to the appellant's zemindary Jumeera, or to the respondent's zemindary

* From the judgment of Bayley and Macpherson, JJ., in Regular Appeal No. 65 of 1864, decided 6th February 1866.

Bahur Bund. The suit originally embraced the land marked as plot No. 5 on the same map; but that parcel was claimed by the appellant (the plaintiff in the suit) as a re-formation on the site of a diluviated village called Chalitabarree; and it is now admitted that he failed to identify the site in question as that of his lost village, if the latter ever existed and formed part of his zemindary.

The lands which remain in dispute are admitted to have been in the respondent's possession since the year 1852, when, in the course of certain thakbust proceedings, which will be more particularly considered hereafter, they were determined to lie within the limits of Zillah Rungpore and the estate of Bahur Bund, and not within the limits of Zillah Goalparah and the estate of Jumeera. The correctness of this determination and the anterior possession of the lands are questions contested in the cause.

The difficulty, and it is always considerable, which their Lordships feel in determining appeals of this description, is, in this particular case, increased by the conflicting opinions concerning the title to the land in dispute which have been expressed in India. This suit to impeach the thakbust award in favor of the respondent, and to recover possession of the lands, was commenced by the appellant in May 1855. For some unexplained reason, it was not brought to a hearing until October 1863, when Mr. Fowle (the Zillah Judge) made a decree dismissing it. In March 1865 a Division Bench of the High Court, consisting of two Judges, reversed that decree, and remanded the cause for re-trial on certain specified issues, with a direction that there should be a further local investigation. The Sudder Ameen, who was deputed to make that investigation, made, on the 10th of June 1865, a careful and elaborate report, which was in favor of the appellant as to the four plots now in dispute, but against him as to the fifth. Mr. Robinson, however, who had succeeded Mr. Fowle as Zillah Judge, did not adopt or act upon that report; but, coming to the conclusion that the plaintiff had failed to establish a title to any of the parcels claimed, again dismissed the suit by a decree dated the 8th of July 1865. The appeal against his decision came before the Judges of the High Court who had directed the remand, but they were divided in opinion; and according to the then existing practice of the Court in such cases, the decree under appeal was affirmed. For the appellant, therefore, we have the officer who made the last local investigation, and one of the Judges of the High Court; whilst for the respondent we have the other Judge of the High Court, the two Zillah Judges, and the officers who conducted the thakbust proceedings.

Their Lordships now proceed to consider more particularly the case made by the appellant. He does not claim all the four plots of land by precisely the same title. It appears that, as early as 1810, the then zemindars of Jumeera and Bahur Bund and a third party, the zemindar of Bheetur Bund, were all litigating the title to a large chur which had formed between two branches of the Burrumpootur.

The facts found in the case, as shown by the report in 2 S. D. A. Reports, p. 16[illegible] and the rude map thereto annexed, which in these proceedings has been called map No. [illegible] were the following: The Burrumpoot[illegible] flowed on all sides of the disputed land; the plaintiff's zemindary (Jumeera) lay [illegible] the east and north sides thereof, and [illegible] the west side extended as far south as the river Suntose (in these proceedings called Sunkosh); the zemindary of Bahur Bund extended from the river Sunkosh to the river Isamuttee; and the zemindary of Bheetur Bund, from the river Isamuttee [illegible] the southward beyond the limits of the contested chur. The Judge who tried the cause in the first instance declared his inability to decide with certainty from which lands the chur had been formed, and accordingly made, what he termed, an equitable division of it between the contending parties.

His ruling is stated in the report as follows: "He was, therefore, of opinion that the most equitable mode of deciding would be to give to the parties respectively the land adjoining to their respective estates and ordered that the land to the northward of a line drawn east and west from the river Sunkosh to the plaintiff's boundary should be taken by the plaintiff (the zemindar of Jumeera); that the remaining portion to the southward of that line should be divided by a line drawn from north and south; and that the land to the eastward of that should belong to the plaintiff, and that the land to the westward should be taken by the zemindars of Bahur Bund and Bheetur Bund, according to their respective boundaries." This decision, after going through all the Courts, was finally affirmed by the Sudder Dewanny Adawlut on the 9th of September 1818.

This decree, though admitted to be a binding adjudication of right, failed to determine

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disputes between the parties. We find in 1827 again disputing as to the direc- and position of the boundary-lines defined the decree. And in that year, Dr. Scott, entleman holding a high civil office in the lah of Goalparah, went upon the land, laid n the boundaries as he conceived them run according to the decree, and put the ties in possession accordingly. On that sion he also made a map, of which that duced by the appellant, and marked No. 7, ports to be a true copy. The correct- s of this copy is, however, disputed by respondent, and has not been proved. ording to map No. 7, a considerable nge has taken place in the course of both Sunkosh and the Burrumpootur between years 1818 and 1827; the western ch of the latter having travelled consi- bly to the eastward.

is, however, clear that, whatever were the ise boundaries laid down by Dr. Scott, Nos. 1 and 2 are the only parcels of land now in dispute which formed part e land which was apportioned by him, was the subject of the decree of 1818. both parties are agreed that what was in the western branch of the Burrum- r, and, therefore, the western boundary e chur then in dispute, is shown on No. 3 by the old channel running from B; and we have, therefore, now to con- r what is the title which the appellant ts to lots Nos. 3 and 4.

he zemindary Jumeera contains two zahs called Takeemaree and Patwama- Bahur Bund contains two mouzahs d Balar Hât and Konearmutty. In 1832 1833 a dispute arose between the then ndars whether certain chur land ulti- ly ascertained by survey and measure- t to consist of 1,478 beeghas 15 cottahs 5 doors, which had been thrown up by river Sunkosh, was a re-formation of of the two former, or of the two latter, zahs, and, therefore, whether it belong- o Jumeera or to Bahur Bund.

his question was, in the first instance, ht in the Fouzdary Courts, and the t of the proceedings there was that the istrate, on the 17th July 1835, made an rd in favor of the appellant, which affirmed by the Commissioner on the of December following. The map No. 6, ch is in evidence in this suit, was made e course of those proceedings. In 1843 zemindar of Bahur Bund brought a suit e Civil Court to set aside the Magistrate's rd, and recover the land comprised there- in; the map No. 5 was made on the occasion of a local investigation ordered in that suit; and on the 20th March 1845 a decree was made in the plaintiff's favor by the Principal Sudder Ameen. That decree was, however, reversed, and the suit dismissed by a decree of the Sudder Dewanny Adawlut on the 26th of September 1847. The result, therefore, of that litigation was to affirm the title of the zemindar of Jumeera to the land in question in that suit, whatever it may have been. And in this suit the appellant claims lots Nos. 3 and 4 as the land so decreed to him in 1847.

By the decree of the High Court directing the remand, against which neither party appealed, the title to all the four plots of land was made to depend on the determination of a single issue; and, in order to see how that came about, it is desirable to consider briefly the judgment of Mr. Fowle and the first judgment of the High Court.

Mr. Fowle found that the whole face of the country had been changed since 1818 or 1810, when the decision, on which the title to plots Nos. 1 and 2 rests, was passed; that the statements of neither party in respect of the different changes were supported by any evidence worthy of credit; and, consequently, that the only thing for the Court to do was to compare the different maps, and on that comparison he came to the conclusion that the plaintiff (the appellant) had failed to prove his case. Both parties, however, seem to have admitted before him (or if not before him, before the High Court on the first appeal), that, whatever had been the changes in the course of the Sunkosh, its true channel in 1810 or 1818 was identical with that which is traced on maps Nos. 5 and 6 as its dry channel, and the southern boundary of the land then in dispute. From this admission it followed that, if the true site of that channel could be ascertained, it would determine the title to all the four plots of land, since all that was north of that line would belong to Jumeera, and all that was south of it to Bahur Bund. And their Lordships think that both parties must be taken to have agreed to be finally bound by the finding on the issue directed by the High Court, *viz.*, whether the line F G or the line P P on map No. 3 was the old bed of the Sunkosh.

It does not, however, appear to their Lordships that the effect of the remand was to shift or affect the burthen of proof, or to prevent a failure to determine the true line of the old bed of the Sunkosh, if such

should take place, from being fatal to the appellant, who had to make out his title to disturb the possession of the respondent.

The earlier judgments in this cause, and their own examination of the maps, have satisfied their Lordships that the attempt to determine the issue above stated by a mere comparison of these so-called maps is hopeless. None of them, unless it be map No. 4, have been made by scale or compass. They are rather rude diagrams than maps in the proper sense of the term. To fix by a comparison of them a disputed line in a country of which the face had never changed, would not be easy. But it is admitted that, during the half century which they cover, the locality embraced in them has been the subject of frequent, and more or less violent, changes, and has probably been affected by almost every annual flood. And their Lordships must express their surprise and regret that suitors in India, who obviously do not shrink from carrying on litigation of this kind at enormous cost, should not be at the pains of causing the maps, which are supposed to be essential to its right determination, to be prepared on something like a scientific principle.

The cause went back after the remand. A Sudder Ameen was deputed to make the local investigation directed to be made; he filed his report; and the argument of the learned Counsel for the appellant may almost be summed up in the proposition that it was the duty of the Courts below, and will be the duty of their Lordships, to adopt and act on that report.

The Sudder Ameen, after admitting that, by means of the alteration in the features of the country, it had become "most difficult to arrive at any correct conclusion in the matter," reported that, on a careful comparison of the maps with the disputed locality, he had come to the conclusion that F G was the old bed of the Sunkosh, and then proceeded to give in detail the grounds on which he had come to that conclusion.

It is obvious that the special value of his opinion must depend on the degree in which the comparison of the maps has been aided by actual observation of the locality, and of undisputed landmarks within it. So far as it rests on mere comparison of maps, or inferences drawn from former proceedings, it is of less weight than the judgment of the Judge, who is, presumably, as competent as the Sudder Ameen to compare the maps, and must speak with greater authority as to the effect to be given to the documents evidence in the cause.

The reasoning contained in his first grou seems to depend almost wholly on a co parison of the maps, particularly m Nos. 2, 5, and 6; on the assumed admiss by the respondent of the correctness of t two latter maps; and on the effect to b given to the replication of her predece in title in the suit of 1844.

The correctness, however, of map No. as a copy of that from which map No. 1 made, has been directly impugned in t suit, and has not been established by appellant. The delineation therein of Ch tabarree, of which there is no trace in m No. 1, certainly casts considerable suspic upon it. And even if it were authenti would, in one important particular, fai support the appellant's case. For it pl the confluence of the Sunkosh with western branch of the Burrumpootur n of Kaladangah, which is marked as nort Bullabhur Kas, and even a little to north of the Konearmutty Dara, or, a events, in the immediate vicinity of that And so far it seems to be in favor of proposition that P P, rather than F G, cates the site of the old bed of the river

Again, the principal argument founde maps Nos. 5 and 6 is that both plac Konearmutty Dara considerably to the of that which each represents to be th bed of the Sunkosh forming the sou boundary of the land then in dispute. it is admitted that the place assigne these maps to the house of Neemc Sircar (an undisputed landmark) cann reconciled with the place assigned t Konearmutty Dara; and the Sudder A assumes that the maps are accurate as site of the dara, but inaccurate as to th of the house. It seems, however, to Lordships that, if inaccuracy in one of particulars is established, little depen can be placed upon the maps. It is matter of speculation whether one site other is misplaced; it may be that bo misplaced.

Of these two maps, it is further observed generally, *first*, that, where differ (and the Sudder Ameen has foun they do differ from each other in respects), greater credit should be given Magistrate's map No. 6 than to the An map No. 5, because the final decree Sudder Dewanny Adawlut in 1847 u the Magistrate's award against the An

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port; and, *secondly*, that the principal question then in controversy, and with reference which these maps were made, was not so much what was the southern boundary now in dispute, as whether the Sunkosh, higher up in its course, had not shifted its bed, so as to give the present appellant (the plaintiff in that suit) a right to claim land to the east of the then flowing river as parcel of his village Takeemaree—a question which was ultimately decided in his favor.

The latter observation affords an answer to the argument of the Sudder Ameen, which is founded on the statement made by the plaintiff in that suit in his replication to the effect that the river Sunkosh had not changed its course for thirty to thirty-five years. But the question here is not what case the respondent or her predecessors in title may heretofore have put forward, but where, in fact, was the old bed of the river; and the final decree of 1847 is inconsistent with the supposition that the Sunkosh had not then shifted its course, and must be taken to be binding against it.

Map No. 4, so far as it bears upon the present question (a point which will be afterwards considered), is treated by the Sudder Ameen as being in the respondent's favor.

In his second ground the Sudder Ameen relies on a supposed admission in the answer of the respondent in this suit. But Mr. Kay showed, as their Lordships think successfully, that this argument of the Sudder Ameen is founded on a misconstruction of the term "the western stream of the Burrumpootur mixed up with the Sunkosh," which he treats as indicating the actual point of confluence of the two rivers; whereas it may, and probably does, mean merely the course of the Burrumpootur after it has received the waters of the Sunkosh.

Another part of the Sudder Ameen's report, which is extremely unsatisfactory, is his attempt to explain the great difference between the quantity of the land comprised within plots 3 and 4, *viz.*, 5,431 beeghas, and that decreed to the appellant in 1847, viz., something less than 1,479 beeghas. This fact affords a strong argument against the identity of the two parcels. Yet almost all that the Sudder Ameen says of it is: "Moreover there seems no reason why the lands to the northward of the line F G should not belong to the plaintiff, because they exceed the quantity before," by which he probably means the quantity formerly claimed. Again, the Sudder Ameen has either failed to identify the Isamuttee of the decrees of 1810 and 1818, or he has placed its site so near the line F G as to make it difficult to see how, between the confluence of the Sunkosh and that of the Isamuttee with the western branch of the Burrumpootur at that time, there could have been lands of Bahur Bund *ex adverso* to the disputed chur sufficient to support the assignment to Bahur Bund of so much of that chur as the decrees of 1810 and 1818 gave to that zemindary. This circumstance was strongly pressed by the learned Counsel for the respondent, and there appears to their Lordships to be much weight in the argument.

A more material consideration is the following: It is clear, as the Zillah Judge, Mr. Robinson, has pointed out, that whether the old bed be at P P or at F G, the true line, if prolonged nearly due west, ought to strike the northern extremity of the boundary-line drawn (speaking roughly) from south to north by Dr. Scott in 1827. Therefore, how far that boundary-line extended in a northerly direction is a question most material to the determination of the present issue. And it is upon that point that the report of the Sudder Ameen seems to be most directly in conflict with the result of the earlier local investigation in 1852. Their Lordships cannot but think that a strong case is required to destroy the effect of those thakbust proceedings. The investigation involved the fixation of the boundaries, not merely of the two zemindaries, but of two conterminous zillahs, Rungpore and Goalparah. It appears to have been made by the Revenue Department with considerable care, the Collectors of both zillahs being parties to it. Their award seems to have been the subject of appeal to the Board of Revenue, which confirmed it; but the grounds of that appeal which might have thrown some light on the present controversy are not found in the record. Mr. Bedford's map No. 4 is by far the most scientific of those produced. He appears to have gone upon the ground, to have mapped it, to have ascertained what lands were in dispute between the rival zemindars, and to have referred those disputes to the Collectors of the two zillahs. Several parcels of land, besides those in question in the cause, were then in dispute. The two Collectors went upon the spot, and determined the boundary wherever it was disputed. Their investigation was treated in the argument as perfunc-

tory, but their Lordships do not think it deserves that character. They seem to have examined the ryots on the ground; and as to one of the disputed points (not however one of those now in question), they differed in opinion, and had to refer that case for determination to higher authority. The remarkable thing is that, according to the concurrent statements of both Collectors, the zemindar of Jumeera almost gave up his case as to the parcels of land which are the subject of this suit. It was argued that the suit itself is an answer to those statements. But it seems to their Lordships to be more probable that the zemindar should, as an after-thought, have determined to disavow his agents, and try the chances of a civil suit, than that the Collectors should have so grossly misapprehended what had passed before them. The result of these proceedings was that the boundary was fixed by prolonging the admitted boundary-line of Dr. Scott to the north-east as is shown in map No. 4. Again, from the Collector's report, it may be inferred that evidence was thus forthcoming to show that the zemindar of Bahur Bund was actually in possession of the land in question. And this is confirmed by the finding of Mr. Fowle (Appendix, p. 1053) on the evidence before him as to the anterior possession.

Their Lordships are of opinion that the report of the Sudder Ameen made 13 years afterwards does not afford a sufficient answer to their thakbust proceedings. They are not satisfied of the correctness of his assumption that the tree which he found standing, whether asoodh or pykar, marked the northern extremity of Dr. Scott's boundary-line. It may have been merely a point in that line, and the Revenue Officers may have been correct in prolonging that line as they did.

Their Lordships have not been insensible to the difficulty, so strongly urged by Mr. Joshua Williams in his reply, of finding any land to correspond with C in map No. 1, consistently with map No. 4. But, considering that C was in 1810 the extreme portion of a chur surrounded on all sides by the Burrumpootur, they do not think that its disappearance in the course of half a century would be altogether unaccountable. Nor can they lay much stress on the attempt of the respondents' mooktear to identify it with kaem land. A native mooktear is very apt to clutch at a false explanation, rather than admit his inability to explain a circumstance which seems to militate against his case.

On the whole their Lordships have come to the conclusion that the report of the Sudder Ameen fails to establish that the line of the old Sunkosh was at F G. They do not feel that, in coming to that conclusion, they are departing from what has been laid down in other cases touching the weight to be given to a report made by an officer deputed to make a local investigation, and stating conclusions drawn from what he has actually found and observed on the ground. Enough has been said to show that the report of the Sudder Ameen in this case is not exactly of that character. But if it were, their Lordships, in treating it as insufficient to destroy the effect of the thakbust proceedings, would be only applying in favor of the respondent the *ratio decidendi* which was applied in favor of the appellant by the Sudder Dewanny Adawlut in 1847, *viz.*, that, where the results of two local investigations are conflicting, the earlier is to be preferred. The principle is reasonable; since in the interval between the two investigations, the features of the locality may have changed, and evidence of possession may have been lost.

If it were necessary for their Lordships, in dealing with this voluminous record, to determine affirmatively where the line of the old Sunkosh was, they would be disposed to prefer the line P P to that of F G. But it is not necessary for them to do this. It is sufficient for them to hold with Mr. Justice Macpherson that the appellant has failed to establish that F G was the true line, the evidence on which a Court of Justice ought to disturb the possession which the respondent has had of the lands in question, certainly since 1852, and probably for a much longer period.

Being of this opinion, they will humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

The 9th April 1873.

Present:

e Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, J. B. Phear, A. G. Macherson, W. Markby, F. A. Glover, Dwarkanath Mitter, W. Ainslie, and C. Pontifex, *Judges.*

Hindoo Law—Widow—Unchastity.

Case No. 1870 of 1870.

ecial Appeal from a decision passed by the Deputy Commissioner of Seebsagur, dated the 1st June 1870, reversing a decision of the Moonsiff of Golaghat, dated the 24th March 1870.

Kerry Kolitanee (Defendant), *Appellant,*

versus

onee Ram Kolita (Plaintiff), *Respondent.*

Baboo Mohinimohun Roy for Appellant.

oos Kalee Prosunno Dutt, Kalee Mohun Doss, and *Nullit Chunder Sen* for espondent.

ELD (by Couch, C.J., Jackson, Phear, Macpherson, rkby, Ainslie, and Pontifex, JJ.) that, under the doo law, as administered in the Bengal School, a ow who has once inherited the estate of her deceased band is not liable to forfeit that estate by reason of *hastity.*

ELD (by Kemp, Glover, and Mitter, JJ.) *contra.*

THE defendant (appellant), Kerry Kolitanee, ing succeeded to the estate of her late band, one Gendela, who died without e, the respondent sought to dispossess and claimed as being Gendela's cousin e the next heir, and entitled to possession, ause the appellant had forfeited her right emain in the enjoyment of her husband's perty by reason of her unchastity. The puty Commissioner of Seebsagur, revers- the decree of the first Court, declared plaintiff to have established his claim as r to Gendela, and gave him a decree for ssession. The defendant appealed, and the peal coming on for hearing before Bayley d Mitter, JJ., their Lordships referred e case to a Full Bench, by order of ference dated the 10th April 1872, with the llowing remarks:—

Mr. Justice Mitter.—"The first question have to determine in this case is whether, der the Hindoo law, as administered in the ngal School, a widow who has once succeeded to the estate of her deceased husband is liable to forfeit that estate by reason of unchastity.

"In order to arrive at a satisfactory solution of this question, we thought it proper to consult some learned Pundits in Court; and we, accordingly, summoned Pundit Issur Chunder Vidyasagur, Pundit Mohesh Chunder Nyaruttna, Officiating Principal of the Calcutta Sanscrit College, Pundit Bharut Chunder Shiromony, Professor of Hindoo Law in the said institution, and Pundit Tara Nath Turkobachusputee, Professor of Grammar and Rhetoric in the same. Pundit Issur Chunder Vidyasagur, however, could not attend on account of ill health. The other three Pundits appeared and orally stated unanimously that the question under our consideration ought to be answered in the affirmative, each giving his separate opinion and the authority on which it rested also orally.

"In this opinion we entirely concur. All the ancient *rishis* or sages, whose works are recognized as authorities in the different schools of Hindoo law current in the country, appear to be unanimous in holding that an act of unchastity is one of the gravest delinquencies of which a woman can be guilty; and hence it is that we find in the Hindoo Shastras so many stringent provisions for its prevention:—

"'Day and night' (says Menu) 'must women be held by their protectors in a state of dependence; even in lawful and innocent recreations, being too much addicted to them, they must be kept by their protectors under their own (dominion.),—(Colebrooke's Digest, Lon. Ed., vol. ii., p. 379.)

"'Through independence' (says Nareda) 'even women of noble families would swerve from their duty. Hence the Lord of created beings has established their perpetual dependence.'—(Colebrooke's Digest, vol. ii., p. 380.)

"'Let her father' (says Yajnavalkya) 'guard a maiden, let her husband guard a married woman. But let her son guard her in age, or, on failure of these, let her kinsmen protect her. In no instance is the independence of women allowed.'—(Colebrooke's Digest, vol. ii., p. 381.)

"'Women' (says Menu again) 'must above all be restrained from the smallest illicit gratification; for, not being thus restrained, they bring sorrow on both families. Let husbands consider this as the supreme law ordained for all classes; and let them, how weak soever, keep their wives under lawful restrictions. For he who preserves his wife

from vice preserves his offspring from suspicion of bastardy, his ancient usages from neglect, his family from disgrace, himself from anguish, and his duty from violation.'—(Colebrooke's Digest, vol. ii., p. 382.)

"'A woman' (says Vrihaspatti) 'must be carefully guarded by her mother-in-law and other venerable matrons.'—(Colebrooke's Digest, vol. ii., p. 384.)

"'If the husband's family be extinct' (says Nareda again), 'or the kinsman be unmanly or destitute of means to support her, or if there be no sapindas, a kinsman on the father's side shall have authority over the woman. But, if the kindred on both sides fail, the king is considered as the protector of the woman; he shall guard her, and shall chastise her if led away from the path of virtue.'—(Colebrooke's Digest, vol. ii., p. 384.)

"'Therefore, guard wives' (says Paithinusi) 'lest mixed classes should spring from them.'—(Colebrooke's Digest, vol. ii., p. 383.)

"'By violating their obligation of fidelity to one only husband' (says Harita), 'and by receiving the embraces of a stranger, vicious women confound families, for a son begotten by an adulterer while the husband is alive is a *cunda*, or, after his death, a *golaca*; therefore let the husband guard his wife from the assaults of lust. If she be lost through vice, the honor of the family is forfeited; if that be lost, the pure succession of progeny is lost; through that loss the sacraments of duties and of manes are destroyed; those sacraments being destroyed, duty falls; duty failing, the husband's soul is lost; and his soul being lost, everything is lost.'—(Colebrooke's Digest, vol. ii., p. 381.)

"Whether the texts above referred to, so far as they relate to the dependence of women, are as liberal as they ought to have been, and whether the Courts of Justice in the country, constituted as they are at present, are bound to carry them out in their integrity, are questions which we need not pause to discuss. It is sufficient for the purposes of our decision to say that they are in full unison with the feelings of the Hindoo community in general, and that the social *status* and privileges of Hindoo women are still ordinarily determined and regulated by them.

"But be this as it may, there can be no doubt whatever that those texts are eminently fitted to give us a clear idea of the general spirit of the Hindoo law so far as it relates to the question of chastity in Hindoo women; and we are therefore justified in referring to them as a valuable guide in the present discussion, which is intimately connected with that question. Such a course of procedure is fully warranted by the decision of the Privy Council reported in p. 173 of the 11th vol. of Moore's Rep.* One of the questions raised in that case was whether, under the Hindoo law as administered in the Benares School, property inherited by a woman becomes her *stridhun*, and a passage of the Mitakshara, the highest authority recognized in that school, directly supporting the affirmative of this proposition, was strongly relied upon in the course of the argument. But their Lordships declined to act upon that passage; and one of the reasons assigned by them was that it was inconsistent with the general spirit of the Hindoo law as shown by the numerous texts declaring the perpetual dependence of women.

"With these preliminary observations let us proceed now to the direct examination of the question we have to deal with in the present case.

"We think it scarcely necessary to remark that the estate of a widow under the Hindoo law is one of a very peculiar character. To compare it with a life-estate, or with any other estate known to the English law would be to misunderstand its nature completely; and if authority is needed to support this proposition, we have only to refer to the remarks made by the Privy Council in the case reported in p. 550, Moore, vol. viii.† It is true that the widow is allowed to succeed to the estate of her deceased husband as his heiress-at-law; and it is also true that she is allowed to represent that estate fully so long as her right to hold it continues to exist. But her dominion over it is rigorously confined within certain defined limits, beyond which she has no power to go; nor is it allowed to descend to her heirs after her death. As 'half the body' of her deceased husband she takes his property in default of male issue, but being not more than half, her power to deal with it is anything but that of an owner in the true sense of the term.

"Indeed, according to the true theory of the Hindoo law, she is nothing more than a trustee for her life for the soul of her deceased husband, if we may use the expression.

"'For women the property of their husbands' (says Vyasa) 'is intended only for use; let them not make waste of it on any account.'

* Mussamut Thakoor Deyhee *vs.* Rai Baluk Ram, 3 W. R. (P. C.) 3.

† The Collector of Masulipatam *vs.* Cavaly Venkata Narrainapah, 2 W. R. (P. C.) 61.

"In commenting upon this passage the author of the Dayabhaga says: (Colebrooke's Dayabhaga, p. 182, ch. xi., s. 1, v. 61) 'Even use should not be by wearing delicate apparel and similar luxuries. But, since a widow benefits her husband by the preservation of her person, the use of property sufficient for that purpose is authorized. In like manner, since the benefit of her husband is to be consulted, even a gift or other alienation is permitted for the completion of his funeral rites.' Accordingly the author says: 'Let not women make waste.' Here 'waste' intends *expenditure not useful to the owner* of the property.

"It is clear from this passage that every use made by a Hindoo widow of the estate inherited by her from her deceased husband, which is not conducive to his spiritual welfare, is, under the Hindoo law current in the Bengal School, an unauthorized act of waste; and the acknowledged founder of that school goes to the length of declaring that she is allowed to use that estate for the purposes of her maintenance, not because she has any independent right to do so, but because, by preserving her person, she confers a benefit on his departed spirit. If this is not the true picture of the trustee-character of the widow, it is difficult to make out what trusteeship means.

"It should not be supposed that the above provisions were intended by their framers to serve as mere moral precepts which the widow is at liberty to obey or to disobey at her pleasure. On the contrary, the utmost precaution appears to have been taken by them to secure their strict enforcement. We have already shown that, according to the Hindoo law, women are deemed to be never fit for independence, and the widow in possession of her husband's estate is no exception to the general rule.

"'When the husband is dead' (says Nareda), his kin are the guardians of his childless widow. In the disposal of the property and care of her person, as well as in her maintenance, they have full power.'

"The authority of this text is distinctly recognized in the Dayabhaga, which says:—'In the disposal of property by gift or otherwise, she is subject to the control of her husband's family after his decease and in default of sons.'—(Dayabhaga, v. 64, s. 1, ch. xi.)

"In order to complete this part of the argument, let us pause for a moment to compare a widow's estate with that of a male heir under the Hindoo law. It is true that, in the latter case also, the spiritual welfare of the deceased proprietor is the only test resorted to for determining the right of succession, but, after the claimant is once found competent to satisfy the requirements of that test, the property is absolutely made over to him as his own in the fullest sense of the term. No effective restriction whatever is put upon his right of enjoyment, and the estate is allowed after his death to descend to his heirs, and not to those of the original owner. The only exception to this rule is to be found in the case of ancestral property under the law current in the Benares School, but the principle upon which that exception is based has nothing whatever to do with the present discussion.

"Nor is it necessary to go very far, in order to find out the reason of this distinction between male and female heirs. Women are incapacitated by their sex from performing the ceremony of *purvana shrad*, which constitutes, as it were, the very corner-stone of the Hindoo Law of Inheritance; and hence it is that we meet with a general tendency in that law to exclude them from the category of heirs. In the few cases in which women are allowed to succeed, they are allowed to do so upon the authority of special texts, and not upon the general principle by which the Law of Inheritance is regulated. 'Accordingly,' says the author of the Dayabhaga (s. 6, ch. xi., v. 11), 'Bondhayana, after premising, 'A woman is entitled not to the heritage, for females, and persons deficient in an organ of sense or members, are deemed incapable to inherit.' The construction of this passage is, 'a woman is not entitled to the heritage,' but the succession of the widow and of certain others (mother, daughter, &c.) takes effect under express passages without contradiction to the maxim.

"The case of the widow affords a curious illustration of the tendency above referred to. So far as the original writers on Hindoo law are concerned, it appears that they were by no means unanimous in recognizing her right of succession, as may be seen from the numerous contradictory texts quoted on the subject both in the Mitakshara and in the Dayabhaga; and, indeed, if we were to guide ourselves solely and exclusively by those texts, it would have been extremely difficult for us to come to any satisfactory solution of the question one way or the other. Among the commentators the author of the Mitakshara is of opinion that the widow is entitled to inherit only when the family is separate.

The author of the Dayabhaga repudiates the distinction between joint and separate family, but he also is obliged to admit that she takes under the authority of special texts, and that it is by those texts that the nature and extent of her right are to be determined and regulated.

"It should not be supposed that the above view of Hindoo widow's estate is opposed to the Full Bench decision reported in p. 165 of the Special Number of the Weekly Reporter, in which it was held that a widow is competent to sell her so-called life-interest in the property left by her husband. We do not wish to express any opinion as to the correctness or otherwise of this decision. It might possibly be supported upon the ground that such a sale is nothing more than mere anticipation of the proceeds which the widow could have realized from the estate if she had kept it in her own possession. But there is nothing in that decision to support the contention that the proceeds thus anticipated can be used by her for any purpose not authorized by the Hindoo law, that is to say, for any purpose not conducive to the spiritual welfare of her deceased husband. The Hindoo law, it should be observed, does not, at least in Bengal, recognize any distinction between the moveable and the immoveable portions of the estate, nor does it recognize any distinction between the *corpus* of that estate and its profits. That these profits do not become her *stridhun*, or peculiar property, in any sense of the term, is manifest from the fact that their residue, which remains after her enjoyment of the estate, is allowed to go to the heirs of her husband, and not to those of her *stridhun*. 'Therefore,' says the author of the Dayabhaga (s. 1, ch. xi., v. 59), 'those persons who are exhibited in a passage above, cited as the next heirs on the failure of prior claimants, shall, in like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested. At such time when the widow dies, or her right ceases, the succession of daughter, and the rest, is proper.' Every expenditure incurred by a Hindoo widow which is not beneficial to the deceased owner is, as we have already shown, an unauthorized act of waste within the definition of that term as given in the Dayabhaga; and the word 'use' in the above passage puts it beyond all doubt that the rule is just as much applicable to the increment of the estate as it is to the *corpus* of it. As for the absence of any distinction between the moveable and the immoveable portions of the estate, we have only to refer to the decision of the Privy Council reported in p. 487, Moore 11.* That decision was passed, it is true, with special reference to the Hindoo law administered in the Benares School, but it may easily be shown upon precisely similar grounds that the same rule holds good in Bengal also. See also the case of Kasheenath Bysack *vs.* Horosoonderee Dossee,† which was a Bengal case.

"Suppose, for instance, that a widow sells her so-called life-interest in her husband's property for a lakh of rupees, the sale may be allowed to stand on the authority of the Full Bench Ruling in question. But can it be contended that she would be entitled to use this lakh of rupees in any manner she thinks proper, or that the male heirs of her husband, who have 'full power over her in the disposal of her property, in the case of her person, and in her maintenance,' under the express provisions of the Hindoo law, would not be competent to take any legal steps to restrain her from 'wasting' the amount? It may well be that the Courts of Justice in this country, constituted as they are at present, are not in a position to compel a Hindoo widow to use her husband's property for the benefit of his soul, although we are far from saying that a Hindoo King would not have been bound to do so to the fullest extent, he being expressly required by the Hindoo Shastras to act as her guardian, and to chastise her if led away from the path of virtue, as may be seen from one of the texts already quoted by us. But those Courts are bound to interfere in cases of waste, and it is in obedience to the general obligation that so many suits, instituted by reversioners to set aside acts of waste committed by widows, have been, and are still being, entertained by them. Suppose, then, that a reversioner brings an action upon the ground that the widow is about to spend a large sum of money derived by her from the profits of the estate for a purpose not authorized by law, and suppose that the prayer is that an injunction should be issued commanding her not to spend it for that purpose, can the Court refuse to grant the injunction, if the ground upon which it is asked for is made out? This question, I apprehend, must be answered in the sa

* Bhugwan Deen Dobey *vs.* Myna Bibee, 11 W. R. (P. C.) 23.

† Clarke's Rep. 91; Shamachurn Sircar's Vyavasta Darpana.

as if the threatened waste had related a portion of the *corpus* of the estate, ss we are prepared to hold that, although are bound to administer the Hindoo law n the widow claims to succeed to the pro- ty of her deceased husband, we are not nd to administer that law when the dis- e is as to the nature of her right and the she is entitled to make of it. We are re that it has been held in some cases that widow is not under any legal obligation to der accounts to the reversioner. We do wish to express any opinion about the cor- ness of these decisions one way or the er. It may even be granted for the sake argument that the widow is not bound make good to the estate any sums already spent by her. But there is no authority ny kind on the strength of which it can eld that she is the absolute mistress of proceeds of that estate, or that the re- ioner is not entitled to take any legal s in order to prevent her from using e proceeds for a purpose other than that tioned by the Hindoo law.

Such then being the nature of the estate erited by a Hindoo widow, every act done er, the effect of which is to incapacitate from using that estate for the only pur- for which she is entitled to use it, rates as a cause of forfeiture. The stion is, therefore, reduced to this, is un- ity an act of this description? Looking his question from a purely Hindoo point view, we feel no hesitation in saying that answer to it ought to be in the affirma-

'Women,' says Menu, the highest and t respected of all the Hindoo legislators, ve no business with the text of the da; thus is the law fully settled. Hav- therefore, no evidence of law, and no wledge of expiatory texts, sinful women as foul as falsehood itself. This is a d rule.' "—(Colebrooke's Digest, vol. ii., 90.)

The following passage of Vyasa, however, ch is cited by Rughoonunduna (one of acknowledged authorities in the Bengal ool), in connection with this very subject, which will be more specifically referred n a subsequent part of our judgment, is l more explicit on the point:—

"'Oh Arundhuti! gifts, fastings, religi- s and other good acts of an *unchaste* man are vain; their religious merits, also tless beauty, are fruitless. Those wicked men, who, by the commission of adultery, ive their husbands, lose from that time the fruits of religious acts, and are doomed to hell.'

"It is clear, therefore, that an unchaste woman, not only causes 'the loss of her husband's soul,' but she is totally incompetent to redeem it afterwards, inasmuch as every act done by her subsequent to the loss of her chastity must be necessarily destitute of all religious efficacy whatever. How then can it be contended that such a person is entitled to retain possession of her husband's estate, when she has, by her own act, reduced herself to a condition which renders her absolutely unfit to use that estate for the only purpose for which it was made over to her. As half the body of her deceased husband, she took it as a trustee for the benefit of his soul; but if she is no longer in a position to fulfil her duties as such trustee, the trust-property must be taken away from her as a matter of course.

"Nor is the above conclusion wanting an express authority to support it.

"That an unchaste widow has no right to succeed to the estate of her deceased husband is, we believe, a proposition of Hindoo law beyond all dispute. The Mitakshara, which is respected as a very high authority more or less in every part of Hindoostan, expressly lays down:—

'Therefore, it is a settled rule that a wedded *wife being chaste* takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies, leaving no male issue.'—(Colebrooke's Mitakshara, ch. ii., s. 1, v. 39.) The discussion in v. 18 is significant. In that verse the author repudiates the claim of a widow who is appointed to raise up issue for her husband, and he bases his opinion on a text of Bridha Menu, which expressly declares that a chaste widow alone is entitled to succeed. It is worthy of remark that a mere appointment to raise up issue cannot, in the absence of anything done by the widow in pursuance of that appointment, affect her chastity in any manner whatever, and yet the bare likelihood of her keeping such an appointment, and thereby losing her chastity, is considered as a sufficient ground for her disinherison. It is clear, therefore, that, in the opinion of the author of the Mitakshara, the widow, who is to succeed to the estate of her deceased husband, must remain under a perpetual obligation to preserve her chastity; and this inference is not only confirmed by the very wording of the text of Bridha Menu upon which he relies, but also by vv. 37 and 38,

in which he says that 'the widow who is suspected of incontinence must' be excluded, and that she who is not supposed likely to be guilty of that offence is alone entitled to take the wealth of her deceased husband.

"It is true that there is no special discussion on this point in the Dayabhaga, but the reason of this omission is obvious. The authority of the Mitakshara, it should be remembered, was at one time supreme even in Bengal, and as the author of the Dayabhaga did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprized at his silence in regard to some of them. It is for this reason that the Mitakshara is still regarded in the Bengal School as a very high authority on all questions, in respect of which there is no express conflict between it and the works prevalent in that school, as may be seen from the remarks made by the Privy Council in the case already referred to.

"But be this as it may, it seems to be clear, upon the authority of the very texts relied upon by the author of the Dayabhaga in order to establish the widow's right of succession, that both the accrual and the continuance of that right are absolutely dependent upon the preservation of her chastity. The very first text quoted by him is one from Vrihaspatti, which says:—

'In scripture and in the Code of Law, as well as in popular practice, a wife is deemed by the wise as half the body of her husband, equally sharing with him the fruits of pure and impure acts. Of him whose wife is not deceased half the body survives. How then should another take his property when half his person is alive. Let the wife of a deceased man, who left no issue, take his share notwithstanding kinsman, a father, a mother, or uterine brother be present. Dying before her husband, a virtuous wife partakes of his consecrated fire; or, if her husband die before her, she shares his wealth—this is primeval law. Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly, half-yearly, and other funeral repasts. With presents to his manes, and by pious liberality, let her honor the paternal uncle of her husband, &c.'—(Dayabhaga, ch. xi., s. 1, v. 2.)

"The word *virtuous* in the above passage is a mistranslation. The original contains two words, 'potibrota' and 'shadhee;' the former meaning, devoted to the *brotto* or ceremony of promoting the happiness of her husband; the latter, chaste.

"According to this text it is clear that it is the chaste widow alone who is competent to perform the religious and other acts conducive to the spiritual welfare of her husband, and, therefore, entitled to succeed to his estate after his death in default of male issue. It is the chaste, and not the unchaste, wife who is regarded 'in the Hindoo Scriptures in the Code of Hindoo Law,' and in the popular practice prevailing among the Hindoos, as half the body of her husband, and it is she, and she alone, who is entitled to partake of his consecrated fire, to offer his monthly, half-yearly, and other funeral repasts, as well as to do those pious acts of liberality which are necessary for the salvation of his soul. An unchaste woman is even as a corpse, for every act done by her is, in the eye of the Hindoo law, absolutely null and void, so far as religious efficacy is concerned; and we might here refer to the case of Shyam Lal Dutt *vs.* Sadhoomony Dassee, reported in p. 362 of the 5th B. L. R., in which it was expressly held that an adoption made by an unchaste widow is invalid notwithstanding that it was made in pursuance of a permission given to her by her husband.

"The next text to which we wish to refer is that of Bridha Menu, which says:—

'The widow of a childless man keeping unsullied her husband's bed, and persevering in religious observances, shall present the funeral oblation, and obtain his entire share —(Dayabhaga, ch. xi., s. 1, v. 7.)

"Who Bridha Menu was, or whether he was a real or a fictitious personage, it is needless for us to inquire. It is sufficient to say that the above passage is recognized by the author of the Dayabhaga as one of the texts upon which the widow's right of succession is based; and that it shows beyond the possibility of a doubt that the preservation of her chastity is a condition precedent to the widow's capability to offer oblations to her deceased husband, and, therefore, to her right to take his estate.

"The third text is one of Vyasa. It says:—

'After the death of her husband, let the virtuous widow observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods, and specially the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable, increase of holiness, and keep the vari

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ts which are commanded by sacred ordi-
nces. A woman, who is assiduous in the
formance of duty, conveys her husband.
ugh abiding in another world, and herself
a region of bliss.'—(Dayabhaga, ch. xi.,
, v. 43.)

"This is the path of duty which the widow
enjoined to follow throughout her life, and
only by steadily persevering in that path
t she can promote the spiritual welfare of
husband. It is to be borne in mind that
capacity to promote such welfare arises
on the date of her widowhood, and not
ore, as may be seen from v. 43 of
, ch. xi. of Colebrooke's Dayabhaga, and it
r the purpose of enabling her to secure
attainment of this object, as well as for
her to which we shall presently refer,
his estate is made over to her. Accord-
y the author of the Dayabhaga, after
g the text of Vyasa above quoted, says:
ce by this and other passages the
rescues her husband from hell, and
e a woman doing improper acts through
gence causes her husband to fall into a
n of horror, therefore the wealth
ving upon her is for the benefit of the
er. Consequently, the wife's succession
oper.'—(Dayabhaga, ch. xi, s. 1, v. 44.)

It will be seen that the author of the
abhaga repeatedly calls the deceased
band the owner of the estate, notwith-
ding the widow's succession, she being in
session of it merely as half his body, and
ly for his benefit. It is clear, therefore, that
rding to the author of the Dayabhaga
e are two reasons for allowing the widow
cceed to the estate of her deceased hus-
d, namely, *first*, because she can rescue
from hell by living in the mode prescribed
the Hindoo Shastras; and, *secondly*, be-
se she might cause his soul to fall into
gion of torment by doing improper acts
ugh indigence. Both these reasons, how-
r, pre-suppose the 'strictest observance
her of the duty of continence,' and it is
this reason that such observance has been
forward by Vyasa as the very first
dition which she must satisfy in order to
l the requirements of her position.

The last text we wish to refer to is one
Catayana cited in the following passage
the Dayabhaga:—

'But the wife must enjoy her husband's
te; she is not entitled to make a gift or
tgage or sale of it.' Thus Catayana
: 'Let the childless widow keeping *unsullied* the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property after his death.' (Dayabhaga, ch. xi., s. 1, v. 56.)

"This passage shows clearly not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'keeping unsullied the bed of her lord.' The participial form of the word keeping, *i. e.*, continually preserving, which is also the form used in the original (পালয়ন্তি,) *Paluyuntee*, proves conclusively that the injunction is one in the nature of a permanently-abiding condition which the widow is bound at all times and under all circumstances to satisfy, and the right of enjoyment conferred upon her being expressly declared to be subject to such a condition, every violation of it must necessarily involve a forfeiture of that right. It has been already shown that the widow's right of succession is dependent solely and exclusively on the authority of special texts, and it would not certainly lie in her mouth to say that she is entitled to enjoy that right without being bound by the conditions which those very texts have imposed upon her.

"It has been said that the same reasoning would apply with equal force to the other portion of the text which requires her to abide with her venerable protector. But this is not a separate condition by itself. It is, in fact, merely ancillary to the preceding condition, namely, that of keeping unsullied the bed of her lord, and is simply as a means to an end. Indeed, it was at one time a matter of grave doubt whether a widow, who has voluntarily left the protection of her husband's kinsmen, is entitled to retain his estate. The question was ultimately settled in the affirmative by the Privy Council. But the decision which is reported in p. 97, Shamachurn's Vyavasta Darpana, Kasheenath Bysack *vs.* Horosoondere Dossee, was expressly put upon the ground that the widow in that particular case had not changed her residence for unchaste purposes. This decision lends considerable support to our view, though in an indirect way, for if, as has been argued in this case, a widow who has once succeeded to the estate of her deceased husband is not liable to forfeit that estate by reason of unchastity, neither the Pundits, who were consulted in that case, nor the Lords of the Judicial Committee, by whom it was ultimately disposed of, would

have put their opinions upon the narrow ground above referred to.

"The other authorities current in the Bengal School are still more explicit on the point.

"Sreekissen Turkolunkar, whose authority has been held in some cases to be superior even to that of the author of the Dayabhaga, expressly declares—'Shadhee (chaste), otherwise the right ceases.'

"The word 'ceases' in the above passage stands for the word *nibirth* (নিবৃত্তি.) in the original; and as this last-mentioned word clearly means the extinction of some pre-existing thing, it seems to be clear that, in the opinion of Sreekissen Turkolunkar, loss of chastity is a cause of forfeiture.

"Rughoonunduna also, the author of the Dayatutta and of several other works which are regarded as high authorities in the Bengal School, appears to be of the same opinion.

"After citing the text of Catayana above referred to, he says, 'Shadhee' (*not unchaste*). Therefore, it is said in the story of Punnuka in the Hurryvansa:—

"Oh Arundhuti! gifts, fastings, and other virtuous acts of an unchaste woman are vain, &c., &c.

"This passage has been already quoted *in extenso* in an earlier part of this judgment, and we have only to observe in this place that the author of the Dayatutta refers to it for the purpose of showing that the Hindoo law insists upon the virtue of chastity as a *sine quâ non* to the widow's enjoyment of the property inherited by her from her husband, because, the moment she commits an act of unchastity, she becomes absolutely incompetent to confer any spiritual benefit upon her deceased husband, or, as the text itself says she 'loses from that time the fruits of religious acts, and is doomed to hell.'

"Lastly, Juggernath Turkopunchanun, one of the most modern authorities of the Bengal School, expressly says: 'Since a woman has not yet performed the duties of widowhood and the like, how can she have a title to the inheritance immediately after the death of her husband? She has an immediate title, because she is disposed to perform those duties; but afterwards, if her propensities happen to change, she forfeits the right she had fully possessed.'—(Colebrooke's Digest, vol. iii., p. 479.)

"And again, in p. 576 of the same volume:—

"'The childless widow, considering that the several property of a woman may be resumed (v. 405), if she do not preserve unsullied the bed of her lord, the legislator expounds this text. The maxim being true in the case of several property over which a woman has exclusive dominion, the same is equitable in respect of an estate devolving on her by the failure of male issue.'

"It is further to be observed that the Hindoo law goes to the length of declaring that a woman who is guilty of unchastity is liable to forfeit even her stridhun or peculiar property. Thus Nareda says: 'Among brethren if one die naturally or civilly without male issue, the rest may divide his property among themselves, excepting the wealth of his wives, and shall support them until they die, provided they preserve unsullied the bed of their husbands. But from other widows the heirs may resume their exclusive property.'—(Nareda Sunhita, p. 21; Colebrooke's Digest, vol. iii., p. 474.)

Catayana also lays down the same rule:—

"But a wife who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who takes delight in being faithless to his bed is held unworthy of the property above described.'—(Colebrooke's Digest, vol. iii., p. 585.)

"In commenting upon this passage, Juggernath says: 'Acts injurious to her husband, the administering of poison or the like, who has no sense of shame, who goes to other towns on false pretences or the like, who destroys his effects, who incurs expenditure for immoral purposes.'—(Colebrooke's Digest, vol. iii., p. 586.)

"Nor is this doctrine wanting in the support of the commentators. We have already seen what Juggernath says upon the subject; and the following passages will show that several other commentators also are of the same opinion: 'Therefore, the property given to a chaste woman by her father-in-law and others shall not be resumed by the relatives as is declared by Vrihaspatti. If she prove otherwise, the property given to her may be resumed. Thus Catayana says: 'It is the wife, devoted to her husband, who is entitled to enjoy the property given to her. If she is not devoted, she is entitled to maintenance. But she, who is mischievous or shameless, or who destroys his effects, or who is unchaste, will not get the property.'—(Viramitradaya, p. 203.)

"Rughoonunduna also relies in p. 53[illegible] his Dayatutta upon the text of Nareda quoted above; and what is still more important for the purposes of our decision is the

he relies upon it with express reference to the estate inherited by a widow from her deceased husband.

"The author of the Vivada Chintamani, after citing the text of Catayana, 'but a wife who does malicious acts, &c.,' says: 'Who does malicious acts, &c. This shows that the kindred should demand even the peculiar property from such a woman.'—(Prosono Coomar Tagore, Vivada Chintamani, p. 266.)

"The word *even* (অপি,) is omitted in Baboo Prosono Coomar's translation, but it goes to show most distinctly that the rule is *à fortiori* applicable to every other kind of property belonging to a woman.

"It may be conceded that the Courts of Justice in this country are not bound to enforce this rule, inasmuch as it has no necessary connection with the law of inheritance, but it throws considerable light on the question we have to determine in this case. If we once admit that want of chastity is in the eye of the Hindoo law a ground of forfeiture, in the case of a woman's *stridhun* over which she has an almost absolute dominion, the inference is almost irresistible that the same rule must apply, at least with equal force, to the case of property given to a widow for a special purpose, the fulfilment of which is altogether inconsistent with the idea of her chastity.

"Indeed, the Hindoo law goes on to declare that an unchaste woman is not entitled even to maintenance. We do not wish to multiply authorities on this point, and we will, therefore, conclude these remarks by quoting the following passage from the Dayabhaga, in which it is expressly laid down that an unchaste woman should be expelled from the family-house: 'Their childless wives conducting themselves aright must be supported. But such as are unchaste should be expelled (নির্ব্বাসিত)'—(Dayabhaga, ch. v., p. 19.)

"Of course the childless wives referred to in this passage are the wives of persons who are themselves disqualified to inherit, but there seems to be no reason whatever why the same rule should not apply with equal force to the wives of those members of the family who are fortunate enough to inherit the family-estate.

"It has been said that some of the texts quoted above refer to many other virtues, besides chastity, and that the argument in favour of forfeiture would be equally strong in the case of the widow's derelictions in respect of those virtues, as in the case of her failure to preserve her chastity. But the answer to this objection is very plain. A chaste widow, who has failed to perform her duties to-day, may perform them on some future date. But a widow, who has once sullied the bed of her lord, not only 'causes her husband's soul to fall into a region of torment,' but becomes 'from that time' absolutely incompetent to do anything for his spiritual welfare. All her fastings and acts of piety become fruitless and vain, and as she no longer remains half the body of her husband, her estate must necessarily come to an end.

"It has been further said that adultery is an expiable offence under the Hindoo Shastras. Whether it is so or not appears to be a doubtful question.

"Culluka Bhutta, the celebrated commentator upon Menu, makes the following observations upon a text of the latter, which has been already quoted in this judgment: 'None of the ceremonies at the birth of children, and so forth, are performed for females with holy texts. This limitation of law is fully settled, hence through the want of solemn rites, accompanied with holy texts, they are not divested of sin; through the want of evidence of law and scriptures, they are not acquainted with the system of duties, and having no expiatory texts, that is being incapable of expiating a sin actually committed since they are debarred from the silent repetition of expiatory texts; women are as foul as falsehood itself, &c.'—(Colebrooke's Digest, vol. ii., p. 391.)

"Some of the modern writers, however, appear to be of a different opinion, though, even according to them, expiation is not permitted after the birth of illegitimate children, which is, in fact, what has happened in the present case. But we do not wish to meet this objection upon this narrow ground. Assuming that expiation is allowable in a case like the present, we are unable to see how that circumstance can affect our decision one way or the other. Expiation might save the widow from the future punishments prescribed for the act itself, but there is no authority in the Hindoo law, so far as we are aware of, to support the contention that it can control the operation of the special texts, under which she inherits, or that it can render her chaste after she has once become unchaste. It is the chaste widow, and the chaste widow alone, who is allowed to inherit the estate of her deceased husband, and she is expressly told

to use that estate solely and exclusively for his spiritual welfare, subject to the condition of 'preserving his bed unsullied;' once unchaste, she must remain unchaste for ever, and, therefore, for ever incompetent to satisfy the condition upon which her title depends.

"Indeed, if expiation can bar the forfeiture, it can bar the disinherison also; but there is no authority whatever to support either of these propositions. The Hindoo law, it should be remembered, recognized the institution of *suttee*. That barbarous practice was current in the country down to a very recent date, when it was abolished by the British Government. But barbarous as it was, it serves as a valuable guide to the true spirit of that law on the particular subject now before us. If the widow wishes to survive her husband, and to represent him and his estate as half his body, she must remain a suttee or chaste woman throughout her life, and it is upon this express condition that she is allowed to take and to enjoy that estate in default of male issue. Indeed, the Hindoo law is, as we have already shown, extremely averse to give property to women, and one of the special reasons assigned for making an exception in the widow's favor is that, by obtaining property, she would be able to avoid temptations of want, and so preserve her chastity, and thereby save her husband's soul from the torments of 'a region of horror.' The case of a widow appointed to raise up issue for her husband, which has already been cited from the Mitakshara, appears to have a very important bearing upon this point. Such an appointment was not, at the time when that work was written, without some support from the Hindoo Shastras, though it was condemned by popular practice as the author himself tells us, and it is, therefore, clear that no amount of *prauschitto* or penance can restore a widow guilty of *unchastity* to the same position as one who is appointed to raise up issue by the express command of her husband. If expiation is allowable in the one case, it would be equally allowable in the other; and if a widow who has raised up issue cannot recover the inheritance by expiation, the unchaste widow cannot, merely by reason of such expiation, claim to stand in a higher position.

"But there is another difficulty of a still more formidable character which must be overcome before this objection can prevail against our view. The widow having, by reason of her unchastity, once become incompetent to use the estate of her deceased husband, her right to use that estate ceases; and as, according to a well-known principle of Hindoo law, property can never remain in abeyance, the estate must immediately vest in the nearest heir of her husband; and having once gone there, no subsequent expiation on her part can bring it back to her.

"It has been said that, according to the Hindoo law, an estate once vested cannot afterwards be divested. But not only is this rule not without exceptions, but its application must necessarily depend upon the nature of the estate in question. In the case of male heirs, who become the true owners of the property in the full sense of the term, such application cannot give rise to any difficulty, although even in such cases, the Hindoo law recognizes certain exceptions to which it is not necessary here to refer. But the case of the widow stands upon a quite different footing. Her estate is one, as we have already shown, essentially in the nature of a trust-estate, for she can use it only for a particular purpose, and for no other; and if she has, by her own conduct, rendered herself totally incapable of using it for that purpose, the divesting must follow as a necessary consequence.

"Much stress has been laid upon the fact that unchastity is not included in the chapter on Exclusion from Inheritance either in the Mitakshara or in the Dayabhaga. The original works, however, are not divided into chapters at all. But, be this as it may, the answer to this objection is obvious. The grounds referred to are general grounds applicable to both classes of heirs—male and female. But the widow's case is of a special nature. As a woman, she would have been altogether excluded from the inheritance, but for the special texts in her favor, and as she takes the estate under those texts, she must abide by the special conditions therein laid down in addition to the general conditions to which all other heirs are subject. The preservation of her chastity is, strictly speaking, more in the nature of a permanent condition attaching to the right itself than a ground of exclusion from inheritance. All married wives are not allowed to inherit. It is only those who are entitled to the rank of 'putnees,' and of these, those only who are chaste are allowed to inherit at all, and they are merely allowed to 'use' the estate in a specified mode so long as they continue chaste. Those married wives who are not entitled to the rank of putnees are allowed maintenance only, but even that is resumable at the instance of the lawful heir if they prove unchaste, as may be seen from v. 48, s. 1, ch. 2 of the Dayabhaga.

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"It may be further remarked that this objection would apply with equal force to the case of a widow who is found unchaste at the time when the succession opens out, but that such a widow has no right to inherit under the Hindoo law appears to be almost universally admitted.

"We will now proceed to discuss the two remaining classes of authorities, namely, the decisions of Courts of Law, and the opinions of European writers on Hindoo law.

"So far as the decisions are concerned, the earlier ones, supported as they are by the *vyvasta* of the Pundits then consulted, are all in support of our view. The first case in point of date is reported in the 20th page of the second volume of Macnaghten on Hindoo law. That case arose in the district of Hooghly, and it was distinctly held therein that an unchaste widow forfeits all right to her husband's estate. The next case reported in that volume is also of considerable importance. It arose in the 24-Pergunnahs, and it was expressly held therein, that an unchaste widow is liable to be expelled from the family-house of her husband. The next case reported in p. 112 of the same volume. In this case it was held that an unchaste widow is not entitled to maintenance from her husband's brother, even though she may have resigned her right in the property of her husband in his favor in consideration of such maintenance. The case of Ranee Bussunt Koomaree *vs.* Ranee Kumal Koomaree, reported in p. 144, 7 Sel. Rep., is also in support of this view as far as it goes, and it was evidently treated as a case of elopement. The case of Rajkoomaree Dossee *vs.* Gopee Dossee, Sud. Rep., 1858, p. 1891, is also in point, so far as the question of disinherison is concerned. It is true that, in that case, there was an allegation of desertion by the husband in his lifetime, but this allegation was considered merely as a piece of evidence on the only issue of fact which was raised in it, namely, whether the woman was chaste or otherwise, as may be seen from the judgment itself. In the case of Doe *d.* Radhamonee Raur *vs.* Nilmoee Doss,* it was unanimously held by members, C.J., Hyde, Jones, and Dunkin, Judges, that an unchaste widow forfeits all rights in the estate of her deceased husband. The case of Doe *d.* Saum Monee Dossee *vs.* Neemy Churn Doss† is certainly the other way. But no authorities are cited in the judgment, nor does it appear that the earlier cases were brought to the notice of the learned Judge by whom it was passed, as may be seen from the concluding words of his judgment, in which he says: 'Further, in this case the widow had been in rightful possession for a long time, and the Court would be disinclined to disturb her in the absence of any decision of a Court of Law, showing that such a person, for such reason as above stated, might be expelled from possession.'

"The last case is that of Srimati Matangini Debi *vs.* Srimati Joy Kali* (5 B. L. R., p. 491), but, for the reasons above stated, we feel ourselves bound to say that it is contrary to the Hindoo law.

"As for the European writers, Mr. Colebrooke is undoubtedly the highest among them in point of authority, and his opinion, as reported in 2 Strange, p. 272, appears to have been that, although unchastity is a cause of disinherison, a widow who has once succeeded to the estate of her deceased husband cannot be afterwards divested of it, except for loss of caste, unexpiated by penance, and unredeemed by atonement. This opinion, however, was given in a case which originated in Trichinopoly, nor does it appear that it was given with any reference to the authorities current in the Bengal School. It is also to be observed that the question propounded in that case contains no specification of the particular bad conduct of which the widow was guilty. But, be that as it may, there is no authority cited to support the proposition that loss of caste is the only ground of forfeiture recognized by the Hindoo law, or that penance and atonement can prevent forfeiture any more than they can prevent disinherison. The great name of Mr. Colebrooke is, no doubt, an authority entitled to the highest respect, but for the reasons above stated, we are constrained to say that in this particular instance it cannot be taken as conclusive. We wish further to remark that Mr. Ellis of Madras, who also was consulted in that very case, gave an opinion directly supporting our view, as may be seen from one of the notes subjoined to it. As for the opinion of Sir Thomas Strange, it seems to be based entirely upon that of Mr. Colebrooke, and we do not therefore wish to dwell upon it any further.

"The opinion of Sir William Macnaghten seems to be in support of our view, as may be seen, not only from the remarks made by

* Montriou's Hindoo Law Cases 314.
† 2 Taylor & Bell 300.

* 14 W. R., O. Jur., Ap. 23.

him in p. 19 of the first volume of his work on Hindoo Law, in which he distinctly says that 'a widow in possession of her husband's estate is nothing more than a trustee for certain purposes,' but also from the cases which are cited by him as leading authorities in the second volume of that work, and which have been already commented upon by us. The only other European writers we wish to refer to are Elberling and West and Bhüler. Both these authorities, however, are in support of our opinion, as may be seen from the remarks contained in pp. 73 and 75 of Elberling's Treatise on Inheritance and in p. 99 of West and Bühler's works on Hindoo Law.

"Supposing, however, that the preceding conclusion is correct as far as it goes, the next question we have to determine is whether this case falls under the purview of Act XXI. of 1850.

"We are of opinion that this question ought to be answered in the negative. This Act was passed for extending the principle of section 9, Regulation VII. of 1832 of the Bengal Code, throughout the territories subject to the East India Company, and its preamble is as follows:—

"Where as it is enacted by section 9, Regulation VII. of 1832 of the Bengal Code, that 'whenever in any civil suit the parties to such suit may be of different religious persuasions, when one party shall be of the Hindoo and the other of the Mahomedan persuasion; or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindoo persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled.' And, whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company."

"These words seem to prove conclusively that the one object which the Legislature had in view in passing the Act was to extend the principle of religious toleration, and the inference is, therefore, almost irresistible, that it could not have been intended to govern a case like the present. The violation of conjugal duty is an offence against universal morality, and it is upon this ground that contracts based upon adulterous considerations are declared by Courts of Justice to be absolutely null and void. To hold that an unchaste woman is entitled to claim the same privilege as a person who has conscientiously changed his religion would be manifestly opposed to public policy, and we are, therefore, of opinion that the construction of the Act ought to be limited to the furtherance of the great principle enunciated in its preamble, and not extended to a case of positive immorality like the one before us. It has been often remarked that the preamble of an Act is the key to its interpretation, and we do not see any reason whatever why we should extend the operation of the Act in question beyond the limits purposed by its framers, and that at the risk, as Mr. Sconce puts it in his judgment in the case of Rajkoomaree Dossee *vs.* Golabee Dossee, 'of relaxing the bonds which tend to secure and elevate the relations of married life.'*

"But there are two other reasons, each of which seems to lead to the same conclusion.

"In the first place it is clear that Act XXI. of 1850 cannot possibly give to any party any right higher than that to which he or she is entitled under the law from which that right is derived. Such a construction would be directly contrary to the principle laid down in the preamble.

"The Hindoo widow takes the estate of her deceased husband under the Hindoo law and that very law prescribes in so many terms that she should remain chaste, and use it for a particular purpose, and for no other.

"If, therefore, she has done an act, the consequence of which is to render her absolutely incompetent to use that estate, a forfeiture would be inevitable, notwithstanding the provisions of Act XXI. of 1850.

"That Act cannot possibly give her an estate higher than that of a Hindoo widow and if she is no longer in a position to use that estate in the only mode sanctioned by the Hindoo law, her right to it must die a natural death.

"Suppose, for instance, that a Hindoo is appointed the shebait of a Hindoo temple and that the endowed property is made over to him subject to the condition of using it for the benefit of the idol, and for no other purpose. If such a person becomes a Mahomedan, and thereby renders himself incompetent to fulfil the conditions of his appointment, can it be contended that Act XXI. of 1850 would entitle him to retain the trust property notwithstanding the conversion?

"Suppose, again, that a Hndoo widow, after having succeeded to the estate of her deceased husband, becomes a convert to Mahomedanism and is about to spend a portion of

* 14 S. D. A. (1858), p. 1897.

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the Government securities left by him, in order to defray the expenses of a pilgrimage to Mecca. If the reversioner brings a suit for restraining her from using the securities for such a purpose, can the Court refuse to grant him the relief sought for? We apprehend not; and if this is conceded, the same principle would equally apply to every other use made by such a widow of her husband's property, for she has, by reason of her very conversion, incapacitated herself from using that property in the only mode in which she could have used it. The Hindoo law, it should be remembered, makes no distinction between the *corpus* and the income of the estate. On the contrary, we have shown already that they are both governed by the same texts.

"It should not be objected that the above view of a Hindoo widow's estate is too much mixed up with the Hindoo religion. This is to a certain extent unavoidable in dealing with all questions arising out of the Hindoo law. The legislators of the Hindoos were also their priests, and it is in consequence of this circumstance that the Hindoo law, at least that portion of it which relates to inheritance, is placed entirely upon the basis of the Hindoo religion. The institution of marriage is still regarded by the Hindoos as a sacrament. It is the foundation of the family—one of their dearest and most cherished institutions—and, as such, the foundation of their society, for society after all is an association of families. To preserve the purity of the conjugal relation was one of the chief objects which the Hindoo legislators had in view, nor need we be surprised at the stringency of the provisions made by them to secure that object, when we take into consideration the condition of Hindoo women in general. Their ignorance and their want of experience render them liable to be easily deceived, and it is for this reason that the Hindoo law has put so many restraints upon them. To remove those restraints until better ones are substituted in their place, would be to introduce a dangerous innovation; nor do we see any reason in justice or equity why the estate of the Hindoo widow should not be regulated by the law from which it is derived. We are bound to administer the Hindoo law as we find it, and we have, therefore, no power to refuse to give effect to that law, merely because it happens to be mixed up with the Hindoo religion.

"Lastly, there seems to be nothing even in the body of the Act, which can render it applicable to the case of a Hindoo widow who is guilty of unchaste conduct. It consists of one section only, and that section is as follows: 'So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law.'

"Now the case of an unchaste widow does not fall within any of the three contingencies contemplated by this section. That it is not a case of renunciation of religion, or of exclusion from the communion of any religion, is almost self-evident; nor can it be said to be a case of loss of caste. Loss of caste might be in some cases the consequence of loss of chastity, but it is not a necessary consequence. The guilty parties might both belong to the same caste, and in such a case there need not be any loss of caste at all, nor is there anything in the Hindoo law which says that an unchaste widow forfeits her right, because she has lost her caste. She forfeits it because she is not a 'shadhee' or chaste woman, and there is nothing in Act XXI. of 1850 to provide for her case. The Hindoo who is born blind, or destitute of any other sense or member of body, cannot inherit, notwithstanding the provisions of this Act, and his case affords an additional ground for holding that its operation was purposely limited to cases involving a change of religious persuasion as indicated by the preamble.

"The Act for the re-marriage of Hindoo widows (No. XV. of 1856) also tends to throw some light on this point. That was passed nearly six years after the promulgation of Act XXI. of 1850, and it was passed for the express purpose of removing all legal obstacles to the marriage of Hindoo widows. Now it is clear that a Hindoo widow who marries a second husband loses, under that Act, all the rights and interests which she had in her former husband's estate, and it is scarcely reasonable to suppose that such a provision would have been introduced in an Act passed with such an object if Act XXI. of 1850 had the extended operation which is sought to be given to it. We admit that we have, strictly speaking, no right to use this circumstance as an argument by itself, for the Legislature might in 1856 have misconstrued what it had done in 1850. But

we refer to it for the purpose of showing how the law was understood to be in 1856, not only by the Legislature itself, but even by that portion of the Hindoo community at whose special request Act XV. of that year was passed.

"The conclusion arrived at by us on both these points is, however, contrary to that arrived at in the case of Srimati Matangini Debi *vs.* Srimati Joy Kali, B. L. R., Vol. V., p. 466, and we, therefore, refer this case to a Full Bench for an authoritative ruling upon the following questions:—

1st.—Whether, under the Hindoo law as administered in the Bengal School, a widow, who has once inherited the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity?

2nd.—Whether the forfeiture, if any, is barred by Act XXI. of 1850."

The case came on for hearing under the order of reference before a Full Bench of five Judges, their Lordships without delivering judgment referred the case for the opinion of a Full Bench of all the Judges.

Baboo Mohinimohun Roy for the appellant.—The two following questions are referred to your Lordships for decision, namely: "*1st*, whether, under the Hindoo law as administered in the Bengal School, a widow who has once inherited the estate of her deceased husband is liable to forfeit that estate by reason of unchastity? and, *2nd*, whether the forfeiture, if any, is barred by Act XXI. of 1850?" I submit that, if a woman has led a chaste life during her husband's lifetime, and succeeds to his property on his death, she does not lose her right to retain possession of that property by reason of her unchastity during widowhood. There is no clear positive text of Hindoo law one way or the other; but the voluminous mass of authorities, which have to be taken into consideration to enable one to arrive at a proper conclusion, bear out the proposition I have stated. These authorities are of three descriptions, and are derived from three sources: *1st*, the ancient commentaries and compilations, such as the Dayabhaga, the authority in Bengal, and of the Mitakshara, the authority in Behar; *2nd*, modern commentaries on Hindoo law, either by Natives or Europeans; and, *3rd*, the reported decisions of the Courts. These, as authoritative rulings, claim priority over even the texts.

Both parties to the suit are admittedly governed by the Bengal School of Law. The great authority on all questions of Hindoo law in Bengal is the Dayabhaga, and in ch. xi., s. 1, vv. 1 to 7, the question is discussed whether a widow is entitled to succeed at all to the estate of her deceased husband. Vv. 2 and 54 appear to be the foundation of the doctrine, as laid down by Vrihaspatti, that a Hindoo widow is entitled to succeed to the estate of a husband, who has left no issue, in preference to father, mother, or brothers; there is also the authority of Yajnavalkya and of Vishnu (in vv. 4 and 5) for the same doctrine. According to v. 6, the widow does not take the estate merely for her subsistence, but her right extends to the whole estate; and these texts make no reference whatever to the widow's conduct, but declare her right to succeed unconditionally. In the next verse (v. 7), where Menu says: "The widow of a childless man keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain his entire share," it is said an authority is found to support the contention that the right of inheritance which a Hindoo widow acquires is a conditional one, and that she is entitled to remain in enjoyment of her husband's property only so long as she fulfils the conditions, and that her failure to perform them gives rise to a forfeiture. Vv. 43 and 44 of the same chapter are also referred to as defining the duties of a widow to be continence and the daily offering of water from the palms of her hands to the manes of her husband, and daily performance of worship of the gods; and as showing that she succeeds only for the benefit of the former owner, and retains possession of the property for the sole purpose of benefiting his soul by the performance of charitable deeds and good works. These verses do not support that contention. In vv. 2 and 3 already referred to, the widow of a childless man is declared entitled to succeed because she is half the body of her husband; in v. 3, the right of the father, the brother and the rest to inherit the estate is totally denied, if a widow remain; the next two verses are also authorities in support of such a widow's right to succeed unconditionally, and in v. 6, the question is raised as to what amount of the property she is entitled to succeed, and it is affirmed that the widow's right extends to her husband's whole estate. In support of this proposition a passage is cited from Menu (v. 7) not to show that the widow is entitled to succeed, for that question has been answered in the former verses, and decided

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the affirmative, but to show to what extent he takes, namely, his entire share. The passage is so understood by the author of the Dayabhaga, who comments on it in the next verse, and deals with it as an authority to show the extent only of the property taken, and nothing more. Vv. 43 and 44 declare that a wife succeeds, because she is capable of performing acts spiritually beneficial to her husband, and she is enjoined to perform those acts; but nowhere is it stated that, if she fail to perform those acts, she forfeits her husband's property; in v. 44 it is laid down that, if a widow commits improper acts, she "causes her husband's soul to fall to a region of horror," yet there is nothing to show that a widow having once taken, she could be divested of the property by reason of such improper conduct. [*Mitter, J.*—The widow cannot perform the *purana* shrádda (পার্ব্বণ শ্রাদ্ধ) and hence a distinction between the widow's succession and that of others who succeed as heirs.] If the sovereign takes without performing the shrad, and shows that the performance of the shrad purvana or otherwise is not the criterion of worship, nor the test by which the estate taken is determined. Besides, succession does not remain in abeyance for a single moment after the death of a person, though his shrad is not performed till some time after.

The author of the Dayabhaga concludes in verse 55 the discussion regarding the widow's right to succeed to her husband's estate in default of issue, her right to obtain her husband's entire share, and in the event there being more than one widow, which of them is to succeed. Then in vv. 56 to 64, he points out the nature of the estate taken by the widow; she "must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it:" and declares what duties she is to perform. In v. 56, in the passage cited from Catayana, the same form of expression is used as in v. 7 "preserving unsullied the bed of her lord." That passage is to be read not as if the enjoyment of the property were to be conditional on the chastity of the widow, but as enforcing a line of conduct which is incumbent on the widow to observe. Is there any warrant given to the next heir to come in till after the widow's natural death. Jimutavahana in commenting on this passage (v. 57) omits (as he does in commenting on v. 7 referred to before) to make any mention of the words "preserving unsullied," &c., but lays great stress on the moderation to be observed in the enjoyment of the property, and the injunction that she is to enjoy it during her life. Two propositions are stated by him, *first*, that a widow must not alienate the property so as to deprive the next heirs; and, *second*, that the widow takes until her death. [*Jackson, J.*—Do you mean to say that it is only after her natural death that the property passes to the next heirs, and that civil death is not known to the Hindoo law, nor meant to apply?] There is such a thing as civil death referred to in Hindoo law, namely, in the Dayabhaga, ch. i., vv. 31 to 33, where it is said that a partition may be made on the death of the father, and by that term is meant not the mere demise exclusively, but "also the state of a person degraded, gone into retirement, and the like." There is no such interpretation given to the word in the chapter which treats of the widow's succession. [*Jackson, J.*—Does not the author of the Dayabhaga proceed on the assumption that the widow is chaste?] He does not enter into the question of the effect of unchastity on the widow's right to retain possession; and in no text is the subject dealt with. [*Mitter, J.*—What interpretation does the author of the Dayabhaga give to the passage, "preserving unsullied the bed of her lord." Surely he does not repudiate it?] He makes no comment on it at all. [*Mitter, J.*—Was that not because the passage was too clear to require comment?] The passage is too clear to require comment, if it is, as I submit it is, one inculcating strict continence, and not one creating a conditional right to retain possession of the estate inherited.

It has been insisted that the widow of a childless man is placed in a peculiar position with respect to the estate inherited by her, inasmuch as the estate goes to her husband's heirs, and not to her own, as in the case of her stridhun; and that the rules of inheritance as regards her succession and right to retain possession are different from those applicable to the succession of sons, daughters, and others. I submit there is no difference whatsoever in this respect, and that the widow has as much right to retain property once vested, notwithstanding any failure of duty, as any of the others. In the Dayabhaga, ch. v., which treats of exclusion from inheritance, it is laid down that "he who dissipates wealth by his vices, should be debarred from participation even though he be the first-born." But the pro-

perty having once vested, there is nothing to show that the son would be liable to forfeit it, if, after succession, he led a dissipated life. So likewise by v. 7, which enumerates some of the classes of persons disqualified from inheriting, if, at the time the succession opened out, the person entitled to succeed came under one of the disqualifications mentioned in that section, he could not take, but if, having taken, he be afflicted with any of the disorders mentioned in that section, there is no authority for saying that he could be divested of the property inherited; but on, the contrary, it has been held (S. D. Ad. Rep. for 1854, p.. 244) that under Hindoo law, though an insane person cannot take as heir, yet, if a person has once succeeded to property, he is not to be dispossessed of it on becoming insane. V. 10 contains a similar passage from Yajnavalkya, and v. 11 lays down that those who are debarred from inheriting should be maintained, excepting the outcast and his son. V. 19, which is referred to in the order of reference, provides that the sons of disqualified persons may inherit if free from similar defect, and that "their childless wives, conducting themselves aright, must be supported; but such as are unchaste should be expelled; and so, indeed, should those who are perverse." This has reference only to widows entitled to maintenance, but not to a widow who has succeeded as heir to her husband. The passages bearing on the subject of exclusion from inheritance in the Mitakshara are to be found in ch. ii., s. 10; and the authors of the Dayabhaga and the Mitakshara agree on the subject. It is important to notice that neither of the two authorities make any mention of the exclusion of an unchaste widow. Further authorities to the same effect are to be found in 2 Colebrooke's Digest (London edition), pp. 459 to 465, and in Shamcahurn Sircar's Vyavasta Darpana, p. 23, *et seq.*

In ch. i., s. 2 of the Dayakrama Sangraha, the widow's right of succession is treated of, and the conclusion come to is that declared by the Dayabhaga to be the law. In the Mitakshara, ch. ii., s. 1, the same subject is discussed, and in v. 39 of that section, it is laid down that "it is a settled rule that a wedded wife, being chaste, takes the whole estate."

Then there are the cases bearing on the point. In Gobind Monee Dossee *vs.* Sham Lall Bysack, W. R., F. B. Rul. 165, it was held that a widow might sell, for other than allowable causes, property which has descended to her from her husband, and that such sale was not an act of waste destroying the widow's right, and vesting the property in the reversionary heirs; and in delivering judgment in the case of Chundrabolee Debia *vs.* Brody, 9 W. R. 584, Mr. Justice Glover says: "A Hindoo widow, with a life-interest in her deceased husband's estate, would be entitled to make the fullest use of the usufruct of that estate; and it seems doubtful, under the late rulings of the Privy Council, whether she could be in any way restrained, however wasteful her expenditure, so long as she kept within the limits of her income, and made no attempt at alienation. The gist of these decisions is that a widow is absolutely entitled to the income of the estate, and no one has a right to interfere with her in the control and disposition of it. In Nobin Chunder Chuckerbutty *vs.* Issan Chunder Chuckerbutty, 9 W. R. 505, it was held that the reversionary heirs were bound by decrees obtained against a widow relating to her husband's estate. With regard to the cases which bear more immediately upon the point which has been referred for the consideration of the Full Bench, the first will be found in 2 Strange's Hindoo Law, p. 272, consisting of a question put to the Pundits, their answer, with remarks thereon. The question was: "A widow with a daughter, but no son by her deceased husband, having taken possession of his estate, is squandering it, being proved to be a bad character: what says the law in such a case?" The Pundits replied: "Though a widow should be proved to be vicious, still, in default of male issue, she has a right to her husband's estate. But not to squander it. It is to be employed in charities and the maintenance of the family, and for this purpose, and to preserve the rights of the daughter, trustees and a receiver must be appointed." Colebrooke in his remarks says: "An unchaste woman is excluded from the inheritance of her husband. See Mitakshara on Inheritance, ch. ii, s. 1, pp. 30, 31. But no misconduct, other than incontinence, operates disinherison; *nor, after the property has vested by inheritance, does she forfeit it unless for loss of caste, unexpiated penance, and unredeemed by atonement.* This opinion of Colebrooke's was adopted by Sir Thos. Strange at vol. i., p. 136 of his work. There is, in fact, no difference between the Mitakshara and Dayabhaga regarding the question which has been submitted for your Lordships' decision. Here we have the opinion of Colebrooke and Strange that unchastity did not work a forfeiture unless it was

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piated by penance, and unredeemed by ement. These cases were fully dis- d in the case that was decided by Justice Markby, in the first instance, and wards affirmed on appeal by Peacock, and Macpherson, J. (Srimati Matangini vs. Srimati Joy Kali, 14 W. R., Or. Jur., In a case tried in the Bombay High rt, two years before the case of Srimati ngini Debi vs. Srimati Joy Kali, be- Westropp and Warden, JJ. (4 Bom. H.C. , Ap. Civ. J., 25), where their Lordships at page 30: "We have consulted the Justice and our other learned brethren lly sitting at the Appellate side of the t, and find that they concur in that view ct XXI. of 1850, which appears to have the same as was taken by Sir L. Peel, C.J., ed. Saum Monee Dossee vs. Neemy Churn ," and it was held that, though, by Hin- w, incontinence excluded a widow from ssion to her husband's estate, yet, if the tance were once vested, it was not to be divested, unless her subsequent inence were accompanied by degra- ; but that, by Act XXI. of 1850, depri- of caste could no longer be recognized king a forfeiture of any right or pro- or affecting any right of inheritance. hall now refer to some cases which t the case of the reversionary heir. 314 of Montriou's edition of Morton's ions is a case decided in 1792, where s held that the incontinence of a w creates a forfeiture of her claim to the ssion. There is nothing to show that state had vested in her, but it may be med that she was never in possession. in 2 Macnaghten's Hindoo Law, p. ase 3, the following question was put: person died, leaving a widow and a er of the half-blood. Subsequently to his , the widow violated the hitherto unsul- ed of her husband, and had a child by a nour of another class, while the brother's uct was consistent with his religion; in case, which of the two is entitled to ed to the property of the deceased? osing the widow, during the lifetime of husband, to have cohabited with a ger, and to have, therefore, been expelled the family, and to have lost her tation, has such widow any right to it her husband's property?" The er was: "It is the general doctrine that virtuous widow of a man who dies g no heir down to the great-grandson eds; but that if she, on the death of ord, be faithless to his bed, she has no right of succession; consequently the widow, in such case, would be excluded by her husband's half-brother. So in the case of her having acted unchastely while her husband was living." Mr. Justice Mitter, in referring to this case, says that "it was distinctly held therein that an unchaste widow forfeits all rights to her husband's estate." Mr. Justice Mitter then refers to the next case at p. 21, case 4, and says that "it was expressly held therein that an unchaste widow is liable to be expelled from the family-house of her husband." No doubt, the opinion of the Pundit is opposed to my view, but there is no authority in the Dayabhaga for such an opinion. [*Couch, C.J.*—I am not so sure that the point is against you. It is stated that "the widow had become a prostitute, and had violated her husband's bed." She may have become a prostitute in the lifetime of her husband.] And it will be seen that, in the first case cited from Macnaghten at p. 20, the Pundit quotes this very v. 19 of the Dayabhaga to which I have referred. It does not appear that the Hindoo law anywhere recognizes the loss of caste, or being an outcast, as a cause working forfeiture. Causes disqualifying from inheritance are not causes working forfeiture. Loss of caste is a cause for exclusion, and Colebrooke's opinion would be consistent with the Hindoo law if loss of caste operated as civil death. But it is very doubtful as to what constitutes civil death. Mr. Justice Mitter next refers to another case at p. 112 of 2 Macnaghten's Hindoo Law under the head of maintenance as *apropos* to the case of a Hindoo widow who has already succeeded, and is in possession. Here there could be no vested right in regard to the future sums of money to be allowed as maintenance, and which might be stopped by the owner or next holder of the estate. Then the case in 7 Sel. Rep., p. 144, to which Mr. Justice Mitter refers, is clearly distinguishable from the present. That was a case of maintenance, and the Judges were quite right in not allowing her maintenance when she became unchaste. The case cited by Mr. Justice Mitter from S. D. A. Rep., 1858, p. 1891, was one of the widow's incontinence and expulsion during the husband's lifetime. There were three elements in this case: (1) The act of unchastity was committed in the lifetime of the husband; (2) the husband had in fact repudiated the wife, or exercised a summary right of divorce in his own favor; and (3) had written a letter in the nature of a nuncupative will reciting that the wife had brought

disgrace on the family. There is another case, Gopal Singh *vs.* Dhungazee, in 3 W. R. 206. It was an extreme case. The Hindoo widow not only became a Mahomedan, but unfaithful to the bed of her deceased husband, and the Court held that, according to the principle laid down in section 3, Act XXI. of 1850, her conversion did not involve forfeiture of inheritance. In the case of Srimati Matangini Debi *vs.* Srimati Joy Kali (14 W. R., O. J. 23), with the exception of the Bombay case and the case cited from 3 W. R., all the other cases were discussed in the judgment. Baboo Shamachurn in his Vyavasta Darpana, p. 1016, para. 663, agreeing with Colebrooke and Sir Thos. Strange, says that a woman, "who became adulterous after inheriting property, or obtaining a maintenance," did not forfeit her right to inheritance or maintenance "unless the crime were such as to cause complete degradation by loss of caste unredeemable by atonement." [*Glover, J.*—Whose Vyavasta is that? There must be some authority for a Vyavasta in order to give it weight.] There is no name given. But Sir Barnes Peacock refers to it in his judgment in the Full Bench case of Srimati Matangini Debi *vs.* Srimati Joy Kali, and says: "With reference to this Vyavasta that, although Baboo Shamachurn Sircar is no authority on Hindoo law, it appears to me that he has there given a correct view of the law on the subject."

Sir Barnes Peacock then goes on to discuss the meaning of Act XXI. of 1850. But before I go to that question, I would ask your Lordships if that question arises in this case at all. The widow has not been subjected to degradation, or deprived of her caste. All that is disclosed is that she committed an act of unchastity, and she belongs to the Soodra caste, the lowest of all castes For an enumeration of castes, see Shamachurn's Vyavasta Darpana 1034-38.

His Lordship Mr. Justice Mitter, in his judgment with the order of reference, says: "The Hindoo law does not, at least in Bengal, recognize any distinction between the moveable and immoveable portions of the estate, nor does it recognize any distinction between the *corpus* of that estate and its profits." I contend that there is some distinction between moveable and immoveable property. It has been held that a widow may make the fullest use of the usufruct, although she may not make any testamentary disposition of the surplus. That is the case in the 9 W. R. 584. Mr. Justice Mitter goes on to say: "Every act done by her (the Hindoo widow), the effect of which is to incapacitate her from using that estate for the only purpose for which she is entitled to use it, operates as a cause of forfeiture." If so, every act of waste would operate as a forfeiture. Referring to the text of Bridha Menu, "the widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his share," the learned Judge observes that the above passage shows "that the preservation of her chastity is a condition precedent to the widow's capability to offer oblations to her deceased husband, and therefore to her right to take his estate." That would apply to the case of a son also. [*Couch, C.J.*—The distinction between the son and the widow would seem to be this: The estate goes to the son to perform certain religious ceremonies, but not only for that. In the case of the widow, the estate is given to her solely for the purpose of performing those ceremonies.] That reason may have swayed the minds of the holy sages. But it is difficult to trace the origin of the right of the widow to succeed to her husband's property. It may be conceded for the sake of argument that the object which the holy sages had was not that the widow should live in affluence and luxury, but in strict religious observances. Gradually, however, the rule has been relaxed. The Dayabhaga and the Mitakshara first of all upheld the widow's right to take in the case of separate brothers and afterwards in all cases. Then the decisions of the Sudder Court and the High Court have extended that principle. It has been held that she can do anything she likes with her estate, and may make the fullest use of the usufruct. If your Lordships accept these authorities, we need not go back to inquire as to the origin of the widow's right. Mr. Justice Mitter seems to think from the participial form of the word "keeping" in the passage "keeping unsullied the bed of her lord," that the injunction is one in the nature of a permanently-abiding condition.

The learned Judge adopts Sreekissen Tarkolunkar's rendering of "shadhee (chaste) otherwise the right ceases." But in the Vyavasta Darpana, p. 28, it is given "shadhee, that is, not adulterous, hence the right of adulterous women ceases," which refers clearly to a wife. The learned Judge seems to think that the liability to resumption of a woman's separate property, if she do not preserve unsullied the bed of her husband, is an argument in favor of his view of the

question. But I submit that it is an argument in my favor, because it shows that the husband may take from the wife property that may have become her stridhun on her becoming unchaste; and I think it may be fairly argued that, when there is a law authorizing a husband to take away a wife's stridhun on the ground of unchastity, the husband will do so by virtue of that law. But in the absence of any law declaring that a widow shall give up any property to which she has once succeeded, she cannot fairly be deprived of that right. As to the text which declares unchaste childless wives liable to expulsion, there is no law authorizing the expulsion of a widow who has succeeded. With reference to Calluka Bhutta's commentary on a text of Menu, to the effect that females are incapable of expiating a sin sexually committed, and that they are as bad as falsehood itself, is no authority any more than those texts of his which treat women as incapable of succeeding at all. I submit that, in the absence of any express law on the subject, and as the weight of authority of decided cases is in my favor, a widow cannot by reason of unchastity be divested of that which has once vested in her.

Baboo Kalee Prosunno Dutt (for the Respondent).—Your Lordships have to determine this question, not according to the opinions of any decided cases, or according to the opinions of any European gentlemen who have written any Treatises on Hindoo Law, but chiefly upon the construction of the original texts. The texts bearing on the widow's position are to be found in the Dayabhaga, ch. xi., s. 1, vv. 56, 60, 61, 62 and 64. But first ch. xi., s. 6, v. 11. By ch. xi., s. 6, v. 11, females are not competent to take the *heritage*. If they take it, it is not as heritage and for their absolute use, but for some other purpose which is mentioned in the special text under which they take. So, according to ch. xi., s. 1, v. 56, the widow does not take it as heritage. The concluding words are "after her let the heirs take it." Here the word *heirs* is used in contradistinction to *widow*. The widow's estate is not the same as that given to a male owner in heritable property. In ch. i., s. 7, the author of the Dayabhaga discusses the question of proprietary rights and the distinction between the Benares and Bengal Schools of Law with regard to co-parceners, and his opinion is that there can be no proprietary right without vested interest without the power of alienation. As, therefore, the widow has not the power of alienation, she has not such a vested interest as is mentioned by the author of the Dayabhaga, and consequently she does not take the heritage. Then one of the essential conditions on her enjoying the property is chastity. In ch. xi., s. 1, v. 2, Vrihaspatti says: "Let the *virtuous* wife take her husband's property." The original word, which has been translated *virtuous*, is *shadhee*. Other schools of law have adopted the same text regarding females. In the Viramitradaya, p. 203 (quoted in Mr. Justice Mitter's judgment), *virtuous wife* is translated "*wife devoted to her husband*." (*Reads* the Sanscrit.) The proper translation is "woman devoted to her father-in-law and others." Then the last words, "will not get *the property*," should be "will not get *even her* stridhun." If, therefore, you can take away a woman's stridhun by reason of unchastity, *à fortiori* you can take away that class of it which is called inheritance. Mr. Justice Mitter, referring to the decision of the Privy Council in 11 Moore's I. A. 173, says: "One of the questions raised in that case was whether, under the Hindoo law, as administered in the Benares School, property inherited by a woman becomes her stridhun; and a passage of the Mitakshara, the highest authority recognized in that school, directly supporting the affirmative of this proposition, was strongly relied upon in the course of the argument. But their Lordships declined to act upon that passage; and one of the reasons assigned by them was, that it was inconsistent with the general spirit of the Hindoo law as shown by the numerous texts declaring the perpetual dependence of women." This question is referred to in West and Bühler's Treatise. But my argument is this, that, whether the Privy Council have so viewed it or not, it is the opinion of the Benares School that property which comes to the woman from her husband is forfeited by unchastity, because all the texts of the Benares School declare that the property which comes to a woman from her husband is her stridhun, and that a woman's stridhun becomes forfeited by reason of unchastity. [*Ainslie, J.*—Does not *stridhun* go to the daughter?] Yes, so far as the property derived from the husband is concerned. But to whomever it will go, forfeiture is unavoidable in case of unchastity. If we go to the Mithila School, we find it laid down in the Vivada Chintamani, p. 265, that "a wife who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who takes delight in being faithless to his bed, is held unworthy of the property before

described" as her own property. So also with regard to the Bombay Schools (see the Vyavahara Mayukha, ch. iv., s. 10, v. 12). Because that text has not been quoted by the author of the Dayabhaga, owing probably to the fragmentary condition of that book, it does not follow that it is not binding on those who are governed by the Hindoo law as administered in the Bengal School. I submit, therefore, that your Lordships can hardly lay down that this principle of forfeiture, which is known to all the other five schools, does not apply to the Bengal School. In the Dayabhaga, ch. v., v. 19, it is said, with reference to childless wives:—"Such as are unchaste should be expelled, and so, indeed, should those who are perverse." There is great force in that word *expelled*. I therefore submit that the principle of forfeiture is not strange to the Bengal School. Though not referred to by the author of the Dayabhaga, it is not opposed to the principles which he has laid down. I may refer to the case reported in 1 Mad. H. C. Rep. 372, where it was held that a Hindoo adulteress living apart from her husband could not recover maintenance from him so long as the adultery was uncondoned.

Baboo Kalee Mohun Dass (on the same side).—In 10 W. R. (P. C.) 21 their Lordships say: "The duty, therefore, of an English Judge, who is under the obligation to administer Hindoo law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindoo system of law, clear proof of usage will outweigh the written text of law." It has been contended, on the other side, that there is no direct authority on the point now under your Lordships' consideration. This case is cited to show that, in the opinion of the Privy Council in the absence of direct texts, the Courts ought to be guided by evidence of usage. The opinion of Pundits is a valuable help in assisting the Court in forming its judgment.

The case of Kasheenath Bysack *vs.* Horosoonderee Dossee, reported in the Vyavasta Darpana, p. 97, shows how anxious the Privy Council were to do justice. But the great source of mistake in all these decisions, and the true cause of failure in them to arrive at a correct conclusion on the subject, is the assumption that, according to the Hindoo law, when property once vests in a widow, it can never be divested except by death. I have been unable to lay my hands on a single text to support this proposition. On the contrary, there are several cases in which the sages point out how the property may be divested. Take, for instance, the case of a widow holding property under a power of adoption. The moment adoption takes place the property divests from the widow, and vests in the adopted son. Then again civil death, loss of caste, disinclination to make atonement, are causes that divest property from a widow. Mr. Justice Mitter has well pointed out the fallacy of this argument and shown that the application of the rule that, according to Hindoo law, property once vested cannot afterwards be divested, depends upon the nature of the estate in question. In showing the difference between the estate of heirs male and of the widow, he says of the latter: "Her estate is one essentially in the nature of a trust estate, for she can use it only for a particular purpose, and for no other; and if she has by her own conduct rendered herself totally incapable of using it for that purpose, the divesting must follow as a necessary consequence." The word "trust estate" is not used in the sense in which it is used in English law. What was meant here is an estate subject to certain terms or conditions laid down expressly by the text under which she takes, or imposed upon her by social usage or local custom. In describing the estate which a widow takes the use of English law terms is unavoidable. In 11 Moore's I. A. 173,* the Privy Council say that "the widow's disabilities depend to a great measure upon the notions which the Hindoo legislators entertained of the infirmity and necessary dependence of the sex." In the case of The Collector of Masulipatam *vs.* Cavely Vencata Narrainapah (8 Moore's I. A. 55†) their Lordships say: "Nor does it appear to their Lordships that the construction of Hindoo law which is now contended for can be put upon the principle of '*cessante ratione cessat et ipsa lex.*' It is not merely for the protection of the material interest of her husband's relations that the widow's power is fettered. Numberless authorities from Menu downwards, may be cited to show that, according to the principles of Hindoo law, the proper state of every woman is one of tutelage; that they always require protection, and are never fit for independence. Sir Thomas Strange (see Strange on Hindoo Law, Vol. I., p. 242) cites the authority of Menu for the proposition that

* 10 W. R. (P. C.) 8.
† 2 W. R. (P. C.) 64.

a woman have no other controller or pro-tor, the king should control or protect her. ain, all the authorities concur in showing t, according to the principles of Hindoo w, the life of a widow is to be one of ascetic ation (2 Colebrooke's Digest, p. 495). nce, probably, it gave her a power of dis-ssession for religious, which it denied to her other, purposes. These principles do not m to be consistent with the doctrine that, the failure of heirs, a widow becomes pletely emancipated; perfectly uncon-led in the disposal of her property; and to squander her inherited wealth for the poses of selfish enjoyment." From 11 o., p. 171,* it will be seen that it was mpted to be shown that, though in er Bengal the estate which a widow s is limited, yet "this is not the of the Western Schools, and that at Be-s, and in the other provinces governed the Mitakshara, no widow's estate in her band's property is absolute; that she has power to dispose of it; and that, if fails to do so, it is after her death sub-to a different course of succession that which obtains in Bengal." The Council, however, rejected such a rine as that. Again, in 9 Moore's I. A., 36† (in what is known as the Shiva-a case), the Privy Council considers right of a Hindoo widow to inherit r the Mitakshara, and it will be admitted the other side that the Mitakshara is aluable an authority upon this point as Dayabhaga. In that case the property in tion was in part the common property of ited family, and in part the separate ac-ition of the deceased; and their Lordships at p. 608: "There being no positive governing the case before us, we must to the principles of the law to guide us etermining it." That is, I submit, just t your Lordships will have to do in this . Instead of calling upon me to prove natively that the Hindoo law divests a w of her inheritance by reason of un-tity, is it too much to ask the other side ite a single authority to show that an haste widow is entitled to enjoy the in-tance at the same time that she fails to the obligations incident to that right, cannot perform a single religious act to note the eternal bliss of her husband ds from Dayabhaga, ch. xi., s. 1, as con-ing the authority of four rishis or sages, , Vrihaspatti, Yajnavalkya, Vishnu and Bridha Menu). The word "virtuous" in v. 1, as Mr. Justice Mitter has pointed out, is not a correct reading of the original (*reads* the Sanscrit). The English equivalent of it is *chaste, plus* the performance of certain duties. It should also be borne in mind that "leaving no issue" is, in the conception of Hindoo lawyers, a great calamity: and as Mr. Justice Mitter has so well pointed out, "keeping unsullied her husband's bed" means something continuous. There is a fifth rishi, Catayana, who says (Dayabhaga, ch. xi., s. 1, v. 56): "Let the childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." The heirs, not of the widow, but of the husband. That has one important bearing on the question of vesting and divesting. (See Burnell's Vyavahara Dayavibhaga, p. 30, for a disquisition on the right of the widow to succeed). The question then stands thus: Vrihaspatti and four other sages have pointed out how the Hindoo law is to be construed: (1) It is admitted that an unchaste widow cannot inherit. (2) It is also admitted that, after the death of the widow, the heir of the husband, and not of the wife, gets the property. (3) A wife's exclusive property differs materially from property inherited from her husband. (4) The rishis are by no means agreed in giving the wife the foremost place as the preferential heir, and it is only under certain texts that the widow takes. (5) Among Hindoos established usage is a better guide than an enquiry into the complicated and contradictory texts of Hindoo law. (6) The practice of good men is certainly inconsistent with the contention on the other side. I challenge my friend on the other side to show that, even among the lowest classes of Hindoos, society tolerates a widow who has forsaken the dictates of her religion nevertheless to enjoy her deceased husband's property. It will be conceded that the wife is half the body of the husband, and that her right of inheritance depends upon the benefit to be conferred by her upon his soul; that under Act XV. of 1856, the widow forfeits upon remarriage, but that expulsion or degradation is not permitted to a widow who has borne a son. It will also be admitted that an unchaste widow is disqualified to perform religious rites. It will also be conceded that the word "daya" or heritage is an expression used in no portion of the Hindoo law when speaking of the widow's interest. That the widow has no power to alienate at plea-

* 10 W. R. (P. C.) 7.
† 2 W. R. (P. C.) 31.

sure is no doubt opposed to the ruling of the Full Bench reported in the Special Number of the Weekly Reporter. There is no doubt that an unchaste widow cannot adopt, as was decided in 5 B. L. R. 362. Nor is there any doubt on the point that not only is property divested from a widow by death, but also by degradation and loss of caste or either. No exception was taken by the other side to the proposition laid down by Mitter, J., that loss of caste is not the only ground of forfeiture recognized by the Hindoo law. One great error into which the other side have fallen is that, because no place is given to the widow under the head of "exclusion from inheritance," there can be no forfeiture, and that she must lose her caste before she can incur forfeiture. And then as regards the conflict between the English authorities upon this point, the authority of Sir William Jones counterbalances that of Sir Thomas Strange, whilst the authority of Sir Wm. Macnaghten may be quoted against that of Colebrooke.

It is a settled proposition of Hindoo law that succession to property cannot remain in abeyance. Also that it is not every childless widow who is entitled to succeed, but only one who will preserve unsullied the bed of her lord. Also that the maintenance of women and their stridhun are liable to forfeiture on the occurrence of a case like the present.

Then, again, property never vests in a woman as in a man, or as in a son or male issue. A widow does not represent her husband in all respects. Coming to our judicial decisions, from 1792 down to the decision of Sir Lawrence Peel in 1851, there was no difference of opinion. [*Couch, C.J.*—Was there any decision between those dates?] There was that case of Kasheenath Bysack *vs.* Horosoonderee Dossee, which went up in appeal to the Privy Council in 1826. Between 1792 and 1819, Sir Thomas Strange was consulted, and both he and Colebrooke were of opinion that, unless expiated by penance, or redeemed by atonement, incontinence would exclude the widow. The authority of Colebrooke and Strange, therefore, do not go to the length that the other side would make out. It may be said that the reason why the unchastity of a widow is omitted from the chapter of Exclusion from Inheritance, is that that chapter treats of Heirs, and inasmuch as the widow is no heir, the chapter of Exclusion took no notice of her. Her right is coupled with the performance of duties and obligations.

In 1809, Mr. Ellis, who was consulted by Sir Thomas Strange, said that "the wife does not succeed unless she be chaste; this is a necessary condition" (2 Strange 273). In 1817 and 1819 there were two cases (cases 1 and 2) reported in 2 Macnaghten's Hindoo Law, p. 18, and one of the texts quoted as an authority in the latter case is that of Bridha Menu, which speaks of "the widow of a childless man keeping unsullied her husband's bed, and persevering in religious observances." In 1823 there is a case (case 5) reported in *Ibid* 112, where it was held that an unchaste widow was not entitled to maintenance from her husband's brothers, even though she may have resigned her right to his property in their favor in consideration of such maintenance; and in this case the text of Catayana:—"Let the childless widow preserving unsullied," &c., and a text of Vyasa requiring the widow to practise "constant abstemiousness" were quoted as authorities. In this case the legal advisers did not go so far as to advise the setting-up of a claim to inheritance (as is now done), but only to maintenance. Then there is the case in 1 Sel. Rep. 144, which is also in our favor. The judgment of Sir L. Peel in 1851 was the first decision against us, but it is of no authority on the present question. All that he says is that no cases have been cited to show that the law is otherwise. In 1858 the Sudder Court refused to follow the law as laid down by Sir L. Peel (S. D. A. Rep., 1858, p. 1891). Speaking for myself and a large proportion of my countrymen none of us ever thought that Act XXI. of 1850 had anything to do with the present question. We always regarded it as an Act passed in the interests of Native Christians and it is very questionable whether it was ever intended to bring about such a revolution as it has done in the position of Hindoos. Thus from 1792 to 1858 the only case against us is the decision of Sir L. Peel. [*Couch, C. J.*—The case in 1858 was one of incontinence in the husband's lifetime.] So far as our jurisprudence goes, there is no difference between incontinence in the husband's lifetime and incontinence after his death (*reads* from Vyavasta Darpana, pp. 24-26). That is the view which the Hindoo lawyers take, and which, I submit, your Lordships ought to adopt until the contrary is shown. If further authority be required to support this contention, I would refer to the cases of appointment in our law, alluded to in Mr. Justice Mitter's judgment. It is of no consequence that the Hindoo law has not fixed the precise time when property vests

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and divests from a widow. There are sands of cases for which no texts of doo law can be cited. As to the author- due to the opinions of the Pundits, see W. R. (P. C.) 22. In 4 Bombay H. C. ., Ap. Civ. Jur., 28, it was laid down on the authority of Colebrooke (who, I e already shown, is not against us) that, ess there is loss of caste and no atone- t, no forfeiture can take place.

he decisions of the Bombay Court is an ority so far as it refers to Colebrooke, no further; but if I show your Lord- s that Colebrooke is not against me, I claim him as an authority in my favor. h reference to the case of Srimati angini Debi *vs.* Srimati Joy Kali, as as the decision of the Chief Justice oncerned, one of his arguments is, if male s do not forfeit, why should females? answer is that males take absolutely; ws take subject to certain texts. It is ly a mistake to regard a Hindoo widow heir. Strictly speaking, she is not an Sir Barnes Peacock cites Baboo Sha- urn as an authority in favor of his That gentleman has expressed his ie that, on a question of this nature, his rity should have been so quoted. all it comes to this, that Sir Barnes ock, in quoting from Shamachurn, ge, and Colebrooke, quotes, in fact, from brooke, to whom the others all refer. So en as decisions go, the case stands thus: he one hand we have Sir William Jones, e, East, Elberling, Strange, and others pport of my proposition: who are the rities on the other side? The result of analysis is five on the one side, and at twelve on the other. The learned plead- ferred to West and Bühler's Digest of doo Law, 297, *et seq.*; 7 Sel. Rep. 144, 2 Morley's Digest 198, and stated that decided cases in his favor were those ed in 1792, 1809, 1817, 1819, 1822, , 1826, 1843, 1858.

for the commentators who have treated uestion, they all took this view of the ion contended for by me. I have dy referred to the Dayabhaga and kshara, and to Burnell's Vyvahara vibhaga, pp. 30 and 31. I would refer to the Vyavahara Mayukha e's edition), pp. 102 and 110; to the da Chintamani 269 and 289; to the ti Chandrika 174, where it is laid down even maintenance is resumable in case nchastity; to the Dayakrama Sangra- h. iii., paras. 16 and 17; Dayatutta 53, of which Mitter, J., has given a translation in his judgment. For definition of "shadhee" and "putnee," see Vyavasta Darpana, pp. 28 and 40. Some of the texts of Hindoo law bearing on the position of a Hindoo widow are given by Mitter, J., at p. 4 of his judgment. By *wife* in the Digest, widow is often meant. Dayabhaga, ch. xi., s. 1, vv. 2, 4, 5, 7, 15, and 17 to be compared with verse 53 to show the difference between the *status* of a son and that of a widow.

As to the second question. [*Couch, C.J.*—That question does not arise.] Looking at the decisions, the opinions of the Pundits, as also the several admitted legal propositions in favor of our view, bearing in mind the peculiar doctrines of our religion, philosophy, and theology, and looking at the fact that a Hindoo's soul will go to perdition unless the necessary rites and ceremonies are performed, I ask your Lordships to decide and judicially legislate on a matter of vital importance to the Hindoos, as Hindoo Judges would do.

Baboo Mohinimohun Roy, in reply, cited 11 Moore's I. A., p. 512; 15 W. R. 63; 9 W. R. 584.

The judgments of the Full Bench were delivered as follows:—

Mitter, J.—In this case I have already expressed my opinion at considerable length in the order of reference, and as I still adhere to that opinion, I do not think it necessary for me to do anything more than to make a few observations merely by way of supplement:—

(1) It is, I believe, a proposition beyond all dispute, and indeed it was fairly conceded at the bar, that an unchaste widow has no right to succeed to the estate of her deceased husband, irrespective of any considerations arising from expiation or condonation. Baboo Shamachurn Sircar says, it is true (see Vyavasta Darpana, p. 1016, Vyavasta No. 663), that loss of chastity operates as a cause of disinherison in those cases only in which there has been no expiation by penance, or condonation by the husband. But the only authority which Baboo Shamachurn has been able to cite in support of his Vyavasta is the opinion of Mr. Colebrooke in the Trichinopoly case already noticed by me in the order of reference. Now, there is nothing whatever in that opinion to warrant the view taken by the Baboo. On the contrary, Mr. Colebrooke lays it down as undoubted law that an unchaste widow has no right to inherit her husband's property, without the slightest reference either to expiation

or to condonation ; and this opinion is supported, not only by all the decided cases on the point, but also by the express provisions of the Hindoo law itself. According to that law, it is the *shadhee*, or chaste widow, alone who is entitled to succeed to the estate of a man who dies without leaving any male issue ; and as it is beyond all question that neither expiation nor condonation can convert an unchaste woman into a chaste one, the opinion of Baboo Shamachurn, which, it should be remembered, does not possess any independent value of its own, must necessarily fall to the ground.

So far, therefore, the ground being clear before us, I confess I feel considerable difficulty in understanding how, in the face of the above concession, and upon the authorities which we are bound to follow in this case, it can be contended that loss of chastity does not operate as a cause of forfeiture also.

Of all the authorities above referred to, the Dayabhaga of Jimutavahana, the acknowledged founder of the Bengal School, is undoubtedly the highest, and it is therefore to the Dayabhaga that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only, namely, the text of Bridha Menu cited in v. 7, s. 1, ch. xi., of Mr. Colebrooke's translation of the Dayabhaga, and that of Catayana cited in v. 56 of the same section and chapter. These two verses are as follow :—

Bridha Menu.

(1) "The widow of a childless man *keeping unsullied her husband's bed*, and "persevering in religious ceremonies, shall "present his funeral oblation, and obtain his "entire share."

Catayana.

(2) "Let the childless widow, *keeping unsullied the bed of her lord*, and abiding "with her venerable protector, enjoy with "moderation the property until her death. "After her death, let the heirs take it."

It will be observed that the first of these two texts is cited by the author of the Dayabhaga for the purpose of establishing the widow's right to succeed to the whole estate of her husband, and not merely to a portion of it, barely sufficient for her maintenance ; and the second, for that of defining the nature and extent of the interest which devolves upon her by virtue of such right, and which, as he afterwards explains to us in terms too plain to be misunderstood, is nothing more than that of a mere holder for the benefit of her husband's soul. Both the texts, however, speak of the widow's obligation to preserve her chastity in precisely the same terms, the words used for that purpose in both of them being exactly the same in the translation as well as in the original.

If, therefore, it be once conceded, as it has been, and as I think it must be, that the fulfilment of that obligation is a condition precedent to the widow's right to take her husband's estate under the first text, I cannot understand upon what principle of construction it can be contended that such fulfilment is not also a condition precedent to her right to enjoy that estate under the second. Surely, we are bound to attach the same meaning to the words "keeping unsullied the bed of her lord" in the text of Catayana, as we do to the words "keeping unsullied her husband's bed" in the text of Bridha Menu, and if we once do so, what reason can we assign for holding that the injunction as to chastity is binding in the one case and not in the other: so far as the principle upon which that injunction is based is concerned it cannot be contended for one moment that there is the slightest difference between the two cases. I have already shown in the order of reference, and I may add that the correctness of that portion of my judgment has not even been questioned in the course of the argument, that an unchaste widow is absolutely incompetent to render any spiritual service to her deceased husband, and as the widow's estate is, under the express provisions of the Hindoo law, destined *solely* and *exclusively* for such service, it requires no argument to show that, if loss of chastity operates as a cause of disinherison, it must also operate as a cause of forfeiture, and for precisely the same reason. Why then should we to hold that the condition of chastity is a valid and binding condition under the text of Bridha Menu but not under that of Catayana? Suppose, for instance, that a Hindoo dies leaving his property to his widow by a will which contains a distinct provision to the effect that she should, while continuing to keep the testator's bed unsullied, use the property, until her death, for his spiritual benefit, and for no other purpose whatever. If the widow afterwards becomes unchaste and thereby renders herself absolutely incompetent to use the property for the only purpose for which it was given to her, can it be said that there would be no forfeiture in such a case? I apprehend not.

Baboo Mohinimohun Roy, who argued

s case with great ability on behalf of the ellant, finding this difficulty staring him the face, attempted to get rid of it by in arguments which I am bound to say more ingenious than sound. He tried of all to cast suspicion upon the authen- y of the text of Catayana, upon the nd that the treatise of which it forms a is not forthcoming. But to whatever e the Baboo's failure to procure a copy he Institutes of Catayana may be as- able, it is perfectly clear that the authen- of the text in question does not admit y doubt or dispute. The very fact that quoted with approbation by the author e Dayabhaga is a conclusive refutation he Baboo's argument; and if further rity is needed, I have only to refer to decision of the Privy Council reported . 514, 11 Moore, in which that very is distinctly characterized by their Lord- as one of "undoubted authority," and for the purpose of determining the na- and extent of the interest which the acquires in her husband's estate the provisions of the Hindoo law.

e next argument advanced by Baboo nimohun was that, in giving effect to xt in question, we should not go be- the particular purpose for which it is in the Dayabhaga, and that as the of that treatise has not made any ments of his own upon the words eping unsullied the bed of her lord," it be presumed that he has rejected that on of the text which contains those s as possessing no binding force what- This, I confess, is rather a noval mode terpreting a work like the Dayabhaga, h is professedly a mere commentary on texts of the ancient rishis, the acknow- ed fountain-head of the Hindoo law. be that as it may, let us see for what cular purpose the author of the Daya- a has cited the text under our con- ation. That purpose was, as he him- tells us in the very verse in which the is quoted, to establish the proposition "the widow must *only enjoy* her and's estate." What this right of enjoy- t means he explains to us in the subse- t verses, in which he says in the most ess terms that every use made by the w of the property inherited by her from husband which is not conducive to his tual welfare is an act of waste. Are we to suppose that, at the very time when author of the Dayabhaga was appealing he text of Catayana as an authority for showing that the widow's estate is destined solely and exclusively for the spiritual welfare of her husband, he was silently engaged in repudiating the binding force of that portion of the text which imposes upon her the obligation of "keeping unsullied the bed of her lord," knowing full well, as he must be supposed to have done, that the strictest fulfilment of that obligation is indispensibly necessary to enable a Hindoo woman to promote such welfare. Such a course of procedure is, on the very face of it, so utterly self-contradictory, that, before we can impute it to a writer like the author of the Dayabhaga, we must have some reason infinitely stronger than that put forward by the pleader for the appellants. With reference to that portion of the argument which is based upon the absence of any express comments by the author of the Dayabhaga upon the words "keeping unsullied the bed of her lord," I have to observe that it is entitled to no weight whatever. The pleader for the appellant seems to forget that the same remark is equally applicable to similar portions of the texts of Bridha Menu and other rishis which are quoted in the Dayabhaga for the purpose of establishing the widow's right of succession, and yet it is admitted on all hands that under those texts an unchaste widow is not entitled to inherit her husband's property. Nor need we go very far to find out the reason of this silence on the part of the author of the Dayabhaga. His functions, it should be borne in mind, were those of a mere commentator, and it was by no means incumbent upon him to explain every word in every text quoted by him, whether that word required an explanation or not. Take, for instance, the words "abiding with her venerable protector" in the very text of Catayana which we have been considering. These words certainly required an explanation, and we accordingly find the author of the Dayabhaga explaining their meaning to us in the verse next to that in which the text is quoted, that is to say, in v. 57. It would be simply absurd to contend that, at the very time when the author was insisting upon the widow's obligation to live under the protection of her husband's male relatives, he was silently releasing her from the main obligation with reference to which the former is nothing but a means to an end, namely, the obligation of "keeping unsullied the bed of her lord." It is true that it has been decided by the Privy Council that a widow does not forfeit her rights in her husband's estate, merely by

reason of her having quitted the protection of his male relatives; but their Lordships expressly put their decision upon the ground that the widow in the particular case before them had changed her place of residence from justifiable motives, and not for "*unchaste purposes.*" This decision is certainly in support of my view, so far as it shows the importance attached by their Lordships to the fact that the widow had not left the protection of her husband's relatives for *unchaste purposes.* But, at any rate, it is conclusive authority on the point that the widow's obligation to live under the protection of her husband's male relatives is merely ancillary to the main obligation imposed upon her by the text of Catayana, namely, the obligation of keeping unsullied the bed of her lord.

It has been said that under the Hindoo law an estate once vested cannot afterwards be divested. Now there is no work on Hindoo law that I am aware of in which it is laid down in so many terms that an estate once vested cannot be divested, nor has the pleader for the appellant been able to point out any. On the contrary, I have already shown in the order of reference that the Hindoo law goes to the length of declaring in the most express terms that an unchaste woman forfeits all her rights, even in her own stridhun, and this is by far a stronger case of divesting than the one now before us. What then is the source from which the doctrine above referred to has been derived? That source, I venture to affirm, will be found in the simple fact that in the generality of cases the Hindoo law makes no provision for the divesting of property once vested; and I am fully prepared to admit that, so far as those cases are concerned, the application of the doctrine in question is perfectly legitimate. But to apply it to the present case, without any reference to the nature of the estate under our consideration, or to the conditions which the Hindoo law has expressly attached to the enjoyment of that estate, would be to assume the very question which we are called upon to determine.

It has been further said that the widow is not a trustee for the soul of her deceased husband, and in support of this position, we have been referred to a case reported in p. 584 of the 9th W. R., in which it was held, or rather remarked incidentally, as I shall presently show, that the widow is the absolute mistress of the usufruct of her husband's estate, and that she can dispose of such usufruct in any manner she think proper.

Whether the word trustee is applicable the widow in the strict sense in which th word is used in works on English Law is question which I need not pause to dete mine. But I think I have conclusive shown in the order of reference that the on right which the widow acquires in h husband's property is the right of using th property for the benefit of his soul, and *no other purpose whatever*, and such a rig I apprehend, is nothing more than that of trustee. With reference to the alleged di tinction between the usufruct and the *corp* of the estate, I have to observe that there nothing in the Hindoo law to support It may be that the Courts of Justice in t country, constituted as they are at present, ha neither the power, nor the inclination, compel a Hindoo widow to use her husban property for his spiritual benefit, but they ha no authority, in my opinion, to lay it down a proposition of Hindoo law that she is liberty to use the income of that property any manner she thinks proper. Accordi to the Dayabhaga, the highest authority the point, every "*expenditure*" incurred the widow out of the estate inherited her from her deceased husband, which not conducive to his spiritual benefit, is act of "*waste*," and the author goes to length of declaring in the most express ter that she is allowed to maintain herself out that estate simply because by preserving person, she confers a benefit upon his dep ed spirit. In the face of such express visions, so perfectly general in their ter what authority have we for drawing distinction between the *corpus* and income of the estate? It has been ur that the texts of Catayana and other ris quoted in the Dayabhaga for the purpose limiting the widow's dominion over estate inherited by her from her husb apply to the *corpus* of that estate, but no the usufruct of it. But if so, from other text or texts is it that the wido right to enjoy the usufruct is derived? Th again it is an unquestionable proposition Hindoo law that the portion of the usufr which remains unspent at the time of widow's death goes, not to her heirs, but those of her husband. But if we are to h that the texts in question refer sol and exclusively to the *corpus* of the est where is the authority upon which the ab proposition is to rest? The case cited fr the 9th Weekly Reporter is not at all

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oint. The only question raised and judicially determined in that case was, whether he portion of the usufruct remaining unpent at the time of the widow's death, can e seized in execution of a personal decree ainst her, and so far as that question is oncerned, the decision is certainly in support f my view. It is true that one of the arned Judges by whom that decision was ssed, remarked incidentally in his judgent, that the widow can, during her lifeme, deal with the usufruct of her husband's tate in any manner she chooses; but that mark, I submit with the greatest deference, nnot be treated as an authoritative exposin of the law, inasmuch as the point with erence to which it was made was not ore the Court on that occasion. Before cluding this portion of my judgment, I h to quote the following observations de by the Lords of the Judicial Committee he case of Bhugwan Deen Dobey *vs.* Myna bee,* reported in p. 513, 11 Moore :—

"The reasons for the restrictions," say ir Lordships, "which the Hindoo law mposes upon the widow's dominion over r inheritance from her husband, whether unded on her natural dependence on hers, her duty to lead an ascetic life, or on e impolicy of allowing the wealth of one mily to pass to another, are as applicable personal property invested so as to eld an income as they are to land. *The ve ancient texts imposing the restricn are general. It lies on those who ert that moveable property is not subt to the restriction to establish that ception to the generality of the rule.*"

hese remarks, it is true, were made by Lordships with reference to the move portion of the estate inherited by a w from her husband. But they are, in opinion, equally applicable to the usu of that estate. The case of Huree Dutt *vs.* Sreemutty Uporna Dossee, ted in 6 Moore, p. 433, is not at all int. It is true that the marginal note at case says that the title of a widow is in the nature of a trust, but there is ing whatever in the decision itself to ort that position.

suming, however, for the sake of argu, that the widow is not a trustee for the of her deceased husband, I do not see reason whatever why she should not by the condition of chastity which the oo law has expressly imposed upon her. That law, as I have already shown, says in the most positive terms that she should enjoy her husband's estate while continuing to keep his bed unsullied, and it does not certainly lie in her mouth to say that the injunction as to chastity ought to be treated as a mere nullity. It has been said that although, under the Hindoo law as administered in the Bengal School, a sonless widowed daughter is not entitled to inherit her father's estate, a daughter who has once succeeded to such estate does not forfeit it by reason of her afterwards becoming a sonless widow. But this case is, by no means, parallel to the one now before us. It is true that the chief reason assigned by the writers of the Bengal School for allowing a daughter to inherit her father's property is that she can perpetuate his lineage and *pinda* by giving birth to a son, but that reason has nothing whatever to do with the nature of the estate given to her, nor is it made a condition precedent to her right to enjoy that estate. The daughter's estate, it should be borne in mind, is precisely of the same character as that of the widow, and is governed by the same text of Catayana which has been so often referred to by me. "Or," says the author of the Dayabhaga, "the word wife (in the text of Catayana quoted in v. 56) is of general import, and it must be understood as applicable generally to the case of a woman's succession by inheritance" (see v. 31, s. 2, ch. xi., Colebrooke's translation of the Dayabhaga). Whatever, therefore, may be the reason upon which the daughter's right of succession is founded, it is clear that the estate inherited by her by virtue of that right is subject to this condition only, that she should, while keeping her husband's bed unsullied, continue to enjoy it solely and exclusively for the spiritual benefit of her father, and it is, therefore, beyond all dispute that, so long as she is competent to fulfil that condition, no question of forfeiture can arise. The mere fact of a daugther becoming a sonless widow after the estate has once vested in her, does not, and cannot, render her incompetent to use that estate for the spiritual welfare of her father; for she can still continue to promote such welfare by leading a chaste life, as well as by doing pious acts for the benefit of his soul; and as there is nothing in the Hindoo law which says that she should hold her father's property only so long as she continues to be, or is likely to become, the mother of male children, there seems to be no reason whatever why the argument put

* 9 W. R., (P. C.) 23.

forward by the pleader for the appellant should be considered to have any bearing upon the question now under our consideration. On the contrary, the daughter's case affords a striking refutation of the contention that the injunction as to chastity laid down in the text of Catayana is a mere moral injunction not possessing any binding force from a legal point of view. It will be seen that the only portion of the Dayabhaga which is devoted to the discussion of the daughter's right of succession is the second section of the eleventh Chapter of that treatise, and if we exclude the 31st verse of that section, by which the author extends the operation of Catayana's text to the daughter, as well as to other female heirs, there is not a single passage throughout the rest of the section, either in the shape of original text or commentary, in which the slightest reference is made to the subject of chastity. But if, as argued by the pleader for the appellant, the words "keeping unsullied the bed of her lord" in the text of Catayana are to be treated as nugatory or superfluous, there would be nothing to prevent an unchaste daughter from inheriting her father's property, and yet it is the admitted law of the land that such a daughter has no right of succession. The above remarks are also sufficient to show the futility of the argument drawn from the fact that the author of the Dayabhaga has made no comments of his own upon that portion of the text of Catayana which contains the words "keeping unsullied the bed of her lord."

The only other authority I wish to refer to is the Vivada Bhungarnub of Juggernath Turkopunchanun, a work which is commonly known by the name of Colebrooke's Digest. I have already shown in the order of reference that there are two passages in this work, in which it is expressly laid down that an unchaste widow forfeits all her rights in the estate inherited by her from her husband. It has been said, however, that Juggernath Turkopunchanun is no authority on questions of Hindoo law; and in support of this position, we have been referred to certain remarks of Mr. Colebrooke quoted in p. 25 of the preface to Baboo Shamachurn's Vyavasta Darpana. I confess I was not a little surprised when I heard this bold assertion. That Juggernath Turkopunchanun is one of the most learned Pundits whom Bengal has ever produced, and that his opinion on questions of Hindoo law is still received with high respect by the millions of Hindoos residing in that country, are propositions which do not, in my opinion admit of any doubt or dispute. His knowledge of the Hindoo Shastras is proverbial and I may add, on the authority of my own personal experience, that even now a Hindoo inhabitant of Bengal, who wishes to repudiate the Vyavasta of any particular individual in regard to any point connected with those Shastras, may be heard to say "why am I bound to follow that man's opinion He is not a Juggernath Turkopunchanun." I yield to no one in my veneration for the great and illustrious name of Mr. Colebrooke but as the only test for determining whether a particular writer is to be considered as an authority on questions of Hindoo law in any particular province of the country, the estimation in which his opinions are held by the Hindoo inhabitants of that province I venture to affirm that, with the exception of the three leading writers of the Bengal School namely, the author of the Dayabhaga, the author of the Dayatutta, and the author of the Dayakrama Sangraha, the authority of Juggernath Turkopunchanun is, so far as that school is concerned, higher than that of any other writer on Hindoo law, living or dead, not even excluding Mr. Colebrooke himself. Of course, in regard to points with reference to which there is a conflict of opinion between Juggernath Turkopunchanun and the three leading writers of the Bengal School mentioned above, the former must give way. But, so far as the particular point now before us is concerned, there is not the slightest pretence for saying that any such conflict exists, and I do not, therefore, see any reason whatever why Juggernath's opinion on that point is to be treated as a nullity, the mere *ipse dixit* of the pleader for the appellant. The learned Pundits who were consulted in this case did not hesitate for one moment to refer to that opinion as an authoritative exposition of the Hindoo law and as for the remarks of Mr. Colebrooke I wish to observe that there is nothing in them to justify the contention that Juggernath Turkopunchanun is no authority on questions of Hindoo law arising in the Bengal School. All that Mr. Colebrooke says is that the arrangement of the Vivada Bhungarnub is defective, inasmuch as the author has mixed up the discordant opinions maintained by the lawyers of the several schools without distinguishing in an intelligible manner which of them is the received doctrine; but there is a wide gulf between that statement and a statement to the effect that the opinion of Juggernath Turkopunchanun

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entitled to no weight whatever. I wish to d that the Vivada Bhungarnub of Juggerh Turkopunchanun is distinctly mentioned Sir William Macnaghten as one of the horities "chiefly consulted" in Bengal p. 21 of the preface to his work on ndoo Law).

Markby, J.—Having regard to the judgnts delivered in the case of Srimati tangini *vs.* Joy Kali Debi and the gment which is about to be delivered by Chief Justice, in which I substantially cur, I do not think it necessary to deliver opinion at very great length.

I consider the question before us to be a neral one, relating to the succession to proty amongst Hindoos, and which, therefore, er section 15 of Regulation IV. of 1793, are bound to decide to the best of our lity by the Hindoo laws.

By the "Hindoo laws" I understand the e thing as in section 27 of the Regula of the 17th April 1780 was described "the laws of the Shastra."

This I take together with the direction of Privy Council in the case of the Collec of Madura *vs.* Moottoo Ramalinga erputty,* 12 Moore's I. A., C., p. 436, our duty is not so much to inquire ther a disputed doctrine is fairly ncible from the earliest authorities as ascertain whether it has been received the particular school which governs the rict with which he has to deal, and has been sanctioned by usage.

aking the texts of the Hindoo law as have been quoted one by one, I think it been fully shown by the judgments deli d in this and the former case that they not warrant the proposition that the estate a Hindoo widow is forfeited *ipso facto* unchastity.

But it is still said that, taken as a whole, Hindoo law does recognize the widow's to hold her husband's estate only in she should be chaste; or, as it has been by Mr. Justice Mitter in the judgment ch refers this case for our decision, "chas is a permanent condition attaching to the t itself."

his is a consideration far more difficult the meaning of particular texts, but it e which we are, no doubt, bound to con r.

Upon this point I know of no authority parable to that of Colebrooke. I know o authority equal to Colebrooke, who has considered this question in the only way in which it can properly be considered, namely, with a thorough and comprehensive acquaintance with the authoritative treatises on Hindoo law, in which the answer of it is to be found. In saying this I intend no disrespect to the opinions of those of my colleagues who express a different opinion. On the contrary, the mere fact that persons so eminently qualified to form an opinion, and so infinitely better acquainted than I am with the modern usages of Hindoos, do hold that the widow forfeits her estate *ipso facto* by unchastity, would lead me greatly to distrust my own conclusions. But, nevertheless, it is acknowledged that the authority for this position is the Hindoo law as expounded in the Sanscrit commentaries, and upon the Hindoo law, so taken and so viewed as a whole, I think Colebrooke's opinion is conclusive.

That opinion is stated in Strange, vol. ii., p. 272, in the form of a remark upon a Pundit's answer, and with deference I think that opinion was not given in any particular case, nor with reference to the law of any particular school. The particular Pundit's answer upon which Colebrooke's remark is made was given in a case which arose in the Trichinopoly Provincial Court. But the Pundit's answers, which are the foundation of Strange's work, are all commented on by Colebrooke with reference to the Hindoo law generally, and not with reference, either to the particular case in which the Pundit was consulted, or to the law of any particular school, unless there happens to be a difference between the schools which is there pointed out. In fact, the Pundit's answers are there discussed precisely in the same way as the present question has been now discussed by us.

I would also point out that Mr. Ellis's remark ignores the distinction between a *wife* and a widow—a distinction which has been frequently pointed out in the course of this case. And moreover (as appears from the preface) it was given on a *journey* without reference to books, and without having seen Colebrooke's opinion to the contrary.

I therefore simply repeat what I said on a former occasion, that, under the Hindoo law, after the property has once vested in the widow, she does not forfeit it by a simple act of unchastity; she not having been degraded or *expelled* from caste.

Upon the construction of Act XXI. of 1850 I express no opinion.

Glover, J.—Two questions have been referred to us:—

(1) Does a widow who has once inherited

* 10 W. R. (P. C.) 17.

her husband's estate forfeit that estate by reason of unchastity? and

(2) If by Hindoo law she does forfeit, is the forfeiture barred by Act XXI. of 1850?

The matter has been so fully detailed in Mr. Justice Mitter's order of reference that I do not feel it necessary to go into it at any length, for I concur to a great extent in the opinion expressed by the learned Judges of the second Bench.

I say to a great extent, because I wish to guard myself against being supposed to agree with their estimate of a Hindoo widow's estate, or with the restrictions which they would place on her use of property descended to her. No doubt a Hindoo widow's estate is one of a peculiar and limited nature, but to the extent it reaches, the widow fully represents it, and she cannot, I think, in accordance with late rulings of the Privy Council, be in any way considered as a trustee for life only. The case of Huree Doss Dutt *vs.* Uporna Dossee (6 Moore 433) is an authority for this contention.

Nor do I agree with the referring Judges as to the widow's power of using the profits of the estate. There are, of course, certain texts of Hindoo law, together with glosses by commentators, which say that she is to use them sparingly, and that she herself is to live an austere and economical life, but the view of the law which has, of late years, obtained in the Privy Council, and in the High Courts of Calcutta and Madras, has been to give her the free use of the profits of the estate, so long as she is in a position to use them, and not to describe any item of expenditure, so long as it does not affect the *corpus* of the estate, as "waste," 3 Mad. H. C. Rep. 116, Kámávadháni Venkata Subbaiya *vs.* Joysa Narasingappa: 9 W. R. 584, Chundrabollee Debia *vs.* Brody.

It is unnecessary to go at length through the various texts of Hindoo law which declare the continued subjection of women, and the effect of unchastity in a wife, as working exclusion from inheritance. It has been fully admitted, in the course of the argument before us, that Hindoo women are in that position, and that it is a principle of Hindoo law to keep them so, and also that no unchaste wife can, as a widow, *take* her husband's inheritance. The question is whether, having once taken it as a chaste woman, she can be made to forfeit it for subsequent unchastity.

In support of the proposition that she is to retain it, it has been argued that there are no precise texts of Hindoo law which d clare forfeiture by an unchaste widow, th unchastity is not to be found amongst t acts which exclude from inheritance, th other heirs who are, by circumstances, deb red from offering funeral oblations after su cession do not forfeit, and that failing dir authority for forfeiture, the rule of Hind law is that property once vested cannot divested.

I do not attach very much importance the fact that there is no mention of uncha ty as a ground of exclusion from inheritan It seems to me to have been one of the f principles of the Hindoo law relative women, that unchastity was a thing tha once and altogether put them without pale of all religious observances, and, con quently, deprived them of all power to f the duties on which inheritance depend and I should not, therefore, have expected find this offence classed with the ordinary qualifications. It was one about which th was to the Hindoo mind no possibility doubt, and the Hindoo lawgivers did apparently think it necessary to include chastity amongst the causes of disheri because it was an offence which admitte no difference of opinion, and they had alre stated in very many texts that the ch wife only should take, and that the unch wife should be excluded. I do not see, th fore, any difficulty in the omission unchastity from the chapter of Exclus Unchaste women, both as wives and wid undoubtedly were excluded, and I can ceive no reason for the omission of t offence in the grounds of exclusion, o than the one I have above suggested. S pose, by way of illustration, that, accordin Hindoo law, abominably-colored individ "albinos" for instance, were from the fact of their color abominable, and unab inherit, and that this was a well-known fixed principle; should we expect to "being of the color of an albino" amo the grounds of exclusion from inheritan Would not rather exclusion be taken granted?

With regard to the absence of texts of bearing exactly on the case before us. the first place I am not prepared to ad that such texts do not exist; but, eve they did not, I should feel inclined to fo the rule laid down by the most respe Hindoo commentators, and approved in m than one case by the Judicial Committe the Privy Council, and instead of isol

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exts to apply what I conceive to be the eneral principles of Hindoo law.

Now a Hindoo widow, according to the actice obtaining in Bengal, takes her husnd's property, when there is neither son, andson, nor great-grandson, under very eculiar circumstances, and burthened with ecial obligations. She is supposed to reesent half of her dead husband's body, d by meritorious acts done in this world benefit the spirit of her husband in the er. The theory of the Hindoo Law of eritance is the capability by the heir of forming certain religious ceremonies which good to the soul of the departed, and he es who can render most service. The s down to the third generation could do st, offer most oblations, and confer the atest benefits, therefore they are first in line of heirship; the widow comes next eing able to confer considerable, though benefit, and it is only because she is able o this that she is allowed to take her and's share.

would seem, therefore, to be a condition edent to her taking the estate that she ld be in a position to perform the cereies and offer the continual funeral oblaa which are to benefit her deceased and in the other world, and in this res her position is very different from that son. The son confers benefits upon his er, from the mere fact of being born ble of performing certain ceremonies. birth delivers his father from the hell d "put," and whether in after-life he the funeral oblations or no, he succeeds s father's inheritance from the fact of being able to offer them. With the w it is not so; she can only perform monies and offer oblations so long as she inues chaste; and directly she becomes aste, from that moment her right to offer funeral cake ceases. There are many of Hindoo law to this effect which been quoted in Mr. Justice Mitter's ing order. I will mention one only as ing more forcibly, perhaps, than the s, that unchastity in a woman makes all ngs of hers worthless. "Gifts, fastings, ous and other good acts of an unchaste an are vain; their religious merits, also ess beauty, are fruitless. Those wicked en, who, by the commission of adultery, e their husbands, lose from that time the of religious acts, and are doomed to

is passage, it is argued, refers to women g coverture, but, if that be so, the principle enunciated applies equally to widows, namely, that unchastity from the time of its being committed spoils immediately the effect of religious acts, in other words, prevents a widow from offering funeral oblations to her deceased husband, and so does away with the only reason for which she was allowed to succeed to his property before other and nearer relations. From the moment of her becoming unchaste, she, so far from benefiting, dooms her husband's soul to torment, and the property which was to be expended in funeral oblations and other ceremonies comforting to the dead man's soul is useless for either purpose. The widow is in a position to rescue the husband's soul from hell, and it is because that, through the temptations of indigence, she might do improper acts, and cause thereby "her husband to fall into a region of horror," she is vested with means to lead a reputable life.

I do not think it necessary to recapitulate all the texts of Hindoo law referred to by Mr. Justice Mitter, but there are two of undoubted authority, which seem to me distinct (so far as any isolated texts can be distinct) as to the necessity of a widow's remaining chaste if she would retain her husband's estate.

The first is from Catayana (quoted in Dayabhaga, c. xi., s. 1, v. 56): "Let "the childless widow, preserving unsullied "the bed of her lord, and abiding with her "venerable protector, enjoy with modera-"tion the property until her death." This, it is contended, means that the widow shall retain the property so long as she lives, provided that, when she took it, she had not sullied the bed of her lord. This seems to me a very unnatural construction of the passage, which I assume that Mr. Colebrooke, a specially learned Sanscrit scholar, has properly translated; "keeping or preserving unsullied the bed of her lord" must surely denote continuance, and refer to the time after the woman took the property originally as a chaste widow. The use of the present form of participle seems to denote this, and when we read the words in connection with the numerous texts which declare that the chaste widow only is entitled to succeed to her husband's estate, and that unchastity renders useless all the religious ceremonies for performing which the property came to her, it seems difficult to construe the words "keeping unsullied" in any other way than that the widow retains the property only so long as she remains chaste. Besides, if the words "keeping unsullied" refer only to past

time, what is to be made of the other part of the condition, "living with her venerable protector." She cannot live with him until she is a widow, and whilst she so lives with him, she is to "keep unsullied," &c., &c.

The second text is to my mind still clearer. It comes from Bridha Menu, an author quoted with approval in the Dayabhaga, and is to the following effect: "The widow of a "childless man, keeping unsullied her hus- "band's bed, and *persevering in religious* "*observances*, shall present his funeral obla- "tion, and obtain his share." Now the use of the word "*persevering*" is remarkable. The widow, whilst she was a wife, could perform no religious observances, therefore these must be referred to some time after her husband's death. Supposing that she was chaste, then she might perform ceremonies and take his share, but she could only persevere in these ceremonies provided she continued chaste, for unchastity would disqualify her from performing them. The word "take," therefore, which in the original Sanscrit means "gain, profit" (*lábh*), must, I apprehend, be construed as meaning keeping or retaining, for the widow took before she had any time to "persevere" (which is a word denoting continuance), and simply because she was her husband's widow, and qualified, by being chaste, to succeed to his share. I do not understand how the word "persevere" refers to anything less than a continually abiding condition.

And there is a third text which may also be quoted from Sreekissen Turkolunkar, a great authority in the Bengal School of Law, who, referring to the widow, says: "Shadhee, chaste, otherwise dominion ceases." It is not easy to apply these words to any other time than one after the widow has become vested with the property.

There are several other texts, some of a later date, others by authors who do not enjoy the same authority as those above recited. They have been quoted at length in the order of reference, and they are so far useful as showing the general *consensus* of professional opinion amongst Hindoo sages and Pundits, and which even goes to the length of declaring that the peculiar property of a woman, *i. e.*, her stridhun, is liable to be forfeited for unchastity. For the forfeiture, under similar circumstances, of maintenance, there are undoubted texts of Hindoo law.

I do not forget that a great authority on all matters of Hindoo law, Mr. Colebrooke, has, in connection with a case arising in the Madras Presidency, given an opinion that a widow, once having succeeded to her husband's property, cannot be deprived of it unless for loss of caste, unexpiated by penance, and unredeemed by atonement. But no texts are given in support of the proposition, and it is opposed to other authority in the opinion of Mr. Ellis.

Sir W. Macnaghten, who is also an undoubted authority, mentions cases in which, although the word "succession" is used, there is evident reference to a time after the property has become vested in the widow, and in one case particularly (Macnaghten's Hindoo Law, vol. ii., 112) endorses an opinion that the widow who violates her late husband's bed is degraded, and has no right to her husband's heritage, and cannot even claim maintenance. This was a case in which the property had undoubtedly vested in the widow, for she had given it up to the next heirs on condition of receiving maintenance.

As to the so-called axiom of Hindoo law, that property once vested cannot be divested, I am not aware of any such inflexible rule, and there have apparently been cases in which it was sought to divest property already inherited on the ground that the owner was disqualified for some one of the reasons set down in the rules of exclusion. And what, moreover, is the case of a widow who has received from her late husband a power to adopt? So long as she declines to exercise that power, the property remains vested in her; directly she adopts, it divests from her, and vests in the adopted son, and if the son dies, the property comes back again, and re-vests in the widow, to be again divested if she has the power and inclination to adopt more than once.

Besides, the widow's estate is not an absolute one such as cannot be divested. It is a limited estate for life; and although the widow fully represents it for the time being she only does so with reference to certain exigencies which the Hindoo law allows. She takes it for a special purpose, *i. e.*, the good of her husband's soul, and under special restrictions, one of which is chastity, and if by her own misconduct she places herself in a position which forbids her doing the thing for which the estate was given her, I cannot see why she should retain it, remembering that, according to native ideas, her doing so keeps her late husband in torment.

The question whether unchastity in a widow operates as a forfeiture has not often come before our Courts; there are, however, some cases in which the point has been decided. The first, Radhamonee Raur *vs.* Nil Monee Dey

as decided by the Full Bench of the upreme Court in 1792, and it was there laid own that a Hindoo widow, by her inconnence, forfeited her right to her husband's tate. It has been contended that the report f this case is very meagre, and that no easons are given. This may be, but the ecision is couched in perfectly clear and unistakeable language, and one of the Judges ho concurred in it was that very distinished oriental scholar Sir William Jones. ny decision on a point of Hindoo law which that learned Judge took part is itled to the greatest respect. I do not, oreover, think I am incorrect in saying at, at the time this judgment was given, e knowledge of Sanscrit was much more fused than it is at present, and that the ass of Pundits was much more respectable d learned.

There are two cases in 1811, notes of which e to be found in Macnaghten's Hindoo law, . 20, 21, in which the forfeiture of an chaste widow is declared. The first case not very clear as to whether the property d been actually vested in the widow, hough the words used lead me to believe t such was the case. In the other, it is re distinctly ruled that the widow who d not *keep* her husband's bed unsullied d no right to his property, and ought to be pelled from the house. The case in page 2 is still more to the point, and has been eady referred to. In all of these cases the rd "succession" is no doubt used, but it is ar that the widow had already taken property, for that, according to Hindoo , cannot remain in abeyance, but vests in next heir directly on the death of the ner. Any act of unchastity, therefore, mmitted by a widow and next heir would committed after the property had vested her, and could not be said to prevent her m inheriting, but rather to make her feit what had already been inherited.

In Kasheenath Bysack *vs.* Hurosoonee Dossee (2 Morley's Digest 198) widow who had ceased to reside in her sband's family for some other cause than chaste purposes was declared not to forit. This case is not of course directly in int, but it raises a strong presumption as what the judgment of the Court would ve been had the widow gone away for chaste purposes.

In Trikrunjee Laljee *vs.* Musst. Laroo (1 ley's Digest 280) it was held that a ow who had married again, *i. e.*, had not pt her first husband's bed unsullied according to Hindoo ideas, forfeited her dowermoney in consequence.

The two cases decided in the Sudder Dewanny Adawlut in 1843 and 1858 do not help us; particularly in Ranee Bussunt Koomaree *vs.* Ranee Kumul Koomaree and others,* the Sudder Court held that an elopement, which, I imagine, presumed unchastity, was enough to cause forfeiture of the maintenance received from the late husband's family. In the other case, Rajkoomaree Dossee *vs.* Golabee Dossee (S. D. A. Rep. for 1858, p. 1891) the unchastity pleaded took place during the lifetime of the husband, and has no reference to the acts of a widow. The case is useful as showing the Sudder Court Judge's opinion as to the bearing of Act XXI. of 1850 on such cases, but does not touch the point I am now considering.

Contra.—There are the cases of Saum Monee Dossee *vs.* Neemy Churn Doss† and of Srimati Matangini Debi *vs.* Srimati Joy Kali,‡ the last of which has caused this reference. The case of Saum Monee Dossee *vs.* Neemy Churn Doss is not, I think, quite satisfactory, for the decision appears to have turned chiefly on the "absence of any decision of a Court of Law showing that such a person" (*viz.*, a widow) "for such a cause as above stated" (*viz.*, unchastity) "might be expelled from possession." Now there *was* a decision on the point—the decision of all the Judges of the Supreme Court in the case of Radhamonee Raur *vs.* Nil Monee Doss §—and taking the words of the judgment into consideration, it might very well be that the decision would have been different had the previous case of 1792 been brought to the Court's notice.

Srimati Matangini Debi *vs.* Srimati Joy Kali is of course exactly in point, and I have considered it with great care and respect. For the reasons above given, however, I am unable to agree with its conclusions.

An argument was made of the unmarried daughter's right of succession, and it was contended that, inasmuch as such a daughter, dying childless, or becoming a widow immediately after she had taken her father's property, was allowed by Hindoo law to retain that property till her death, notwithstanding that she conferred none of the benefits on her father's soul which were expected of her. The widow, although unchaste and similarly unable to confer those benefits, should, by a

* 7 Sel. Rep. 144.
† 2 Taylor & Bell 300.
‡ 14 W. R., Or. Jur., Ap. 23.
§ Montriou's Hindoo Law Cases 314.

parity of reasoning, be allowed to retain her life-estate. I do not see any analogy between the two cases. The daughter is declared by Menu to be equal to the son, who is even as the man himself, and she, by oblations duly presented, confers great benefits on her deceased father. No doubt she would confer far greater benefits if she perpetuated his race, and bore a son, but she can still present oblations even as a sonless widow, and the next heir could not, for the oblation would cease with the daughter's son. This seems to me a very sufficient reason why the sonless daughter, having succeeded whilst in a position to bear sons, should retain the inheritance for life, and it is surely far different with the widow who has, by her own misconduct, rendered herself incapable of offering any oblations, or of conferring any of those benefits which formed the sole ground for her taking the estate of her husband. From the moment she becomes unchaste, the widow's religious observances are useless, and her deceased husband falls, as the Hindoo commentator styles it, "into torments."

It has been said that much inconvenience is likely to be caused by declaring unchastity in a widow a cause of forfeiture, and that many conveyances may be voided, and much litigation set on foot. Of this I suppose we must take our chance. My experience tells me that purchasers from Hindoo widows know perfectly well what they are about, and make up for the risks they run by paying very little for what they buy. I have rarely seen a purchase from a widow that was a fair one; and if this class of speculative buyers be put to inconvenience or loss, I do not think it a matter for much regret.

On the whole, and after the best consideration I can give to the subject, I would answer the first question referred by the Division Bench in the affirmative.

The second question does not arise, there being no contention that the widow has been excluded from caste; but if it did, I should be strongly of opinion that Act XXI. of 1850 did not bar the forfeiture. That Act was meant for the relief of those who, from conscientious motives, found it necessary to abandon the faith of their ancestors, and not for cases like the present. If a Hindoo widow can become unchaste, and still under cover of this law retain her estate, she makes (setting moral considerations aside) a very good thing of her incontinence. The Hindoo religion forbids her offering oblations, or performing religious ceremonies for her husband, and consequently she has to expend no part of her property on these observances, but keeps it all for herself. It can hardly be supposed that the Act had this in view, or intended to hold out a premium to immorality.

Phear, J.—I have had the advantage of perusing the draft of the judgment which the Chief Justice is about to deliver, and as I concur substantially in the whole of it, I think it is unnecessary that I should now give at length in other words the reason for my opinion. I desire, however, to say that I quite perceive the great force of the argument by which my learned brother Mitter has, in the Court below, supported his view of the law applicable to the case, and the clearness with which he has expounded the ancient texts. Had the matter been *res integra*, and had we been now called upon for the first time to determine upon the foundation of these texts *alone* the limitations to which a Hindoo widow's enjoyment of property should be subjected, I think it possible that we might arrive at a result very different from anything which has hitherto been recognized by our Courts as the widow's right. At the same time I also feel very certain that nothing can be conceived much more remote from that which was probably in contemplation of the Hindoo law-sages than the exceedingly artificial subject, which the special respondents now ask us to say is the result of their precepts, namely, an estate of inheritance in the widow subject to defeasance, after vesting, upon the occurrence of a contingent event. We have only to look at this principal text of Nareda—"When the "husband is dead, his kin are the guardians of "his childless widow; in the disposal of the "property and care of her person, as well as in "her maintenance, they have full power"—in order to become aware how great is the modification and the amount of adaptation to modern requirement which the old Hindoo texts must be made to undergo before we can reach through them, even to the proposition of the defendants. The truth is, as it seems to me, that it is now much too late to seek merely the primitive meanings of the venerable authorities which have been quoted before us, because these have long ago, in regard to the very matter now in question, received solemn interpretation in the light afforded by the exigencies of modern society. It has been for some time judicially settled by the long series of decisions with which the Chief Justice deals that, according to Hindoo law, inclusive of the texts discussed before us, the widow does, at her husband's death, in the absence of a son, grandson, &c., if she be

hen without disqualification, succeed to her husband's property, and represents it fully as a estate of inheritance; and, further, that he does not forfeit it on the subsequent occurrence of disqualification; that in these two articulars she is in the same situation as a ale heir. We are now asked to say that, so as the last particular is concerned, the decisions have violated the spirit of the Hindoo w, as it may be ascertained in the cited ts, and are therefore wrong. It appears me that we cannot do this, without at the me time saying that they are wrong in the e particular with regard to males—nay, ther, that they are wrong in giving the dow the estate of inheritance at all.

With these views I am of opinion that the t question ought to be answered in the ative, and if that be so answered, the ond question does not arise.

Jackson, J.—The question here raised for rmination by the Full Bench is not only ome difficulty, but of really vast importce.

rom unascertained causes, immoveable perty is notoriously, in some parts of gal, to a very large extent in the hands Hindoo widows, whose relations with the lies of their deceased husbands are not ys amicable, whose personal liberty is , it may be said, wholly unlimited, and e enjoyment of the estate not merely rs, but often seriously impairs, the pros s of reversioners.

, therefore, it be recognized as a rule of by this tribunal (which, constituted as to-day, concludes and binds every Court ustice in a province numbering 42 mil s of Hindoo inhabitants) that a Hindoo w forfeits by unchastity the estate ch she has taken as the heir of her hus d, then I apprehend not only will a ful cause of domestic discord be largely nded, but a motive will be afforded, y the least of it, for publishing and ing into Court the most deplorable dals. That such a ruling will tend in great degree to purity of life and man I do not believe; but it is likely enough rnish a stimulus to perjury, or to col e proceedings equally nefarious. This ed is not a reason for deciding, in one or the other, the question we have e us, but it is mentioned only for the se of showing the gravity of that tion.

is, I think, a matter of regret that so rtant an issue has been raised in the ular case before the Court, because it does not appear necessarily to arise upon the original contention of the parties, upon the issues framed in, or the decision passed by, the Court of first instance, also because the *status* of the parties (people of the blacksmith caste in Assam) and the trivial amount of the matter in dispute have been unfavourable to that full research and discussion which the importance of the abstract question demanded.

The broad question now submitted to us was not so much as touched upon in the judgment of the Moonsiff, who, as it happened, was a native of Assam, and who maintained the widow in enjoyment of the husband's property on the ground that she had contracted no second marriage, and that, consequently, the first marriage was still undissolved and valid. If the question had been fairly raised below, it is probable that some evidence would have been produced as to the rules of caste and the condition of the tribe to which the litigants belong, of which at present we are in utter ignorance. And I confess that this is the circumstance which, in my opinion, takes away much of its value from the evidence given by the Pundits who were examined by order of the Division Bench. I was surprised at finding so little allusion to their testimony in the argument before us, and I take it these learned persons deposed rather to the law as it is found in the Shastras, than to observances of the present day, and I do not understand that they pretended to any knowledge of the customs of Assam.

Without any disparagement of the learned and ingenuous gentlemen who addressed us on behalf of the respondent (reversioner), it must be admitted that everything which could be said on that side of the case has been set forth in the referring judgment of Mr. Justice Mitter with his accustomed ability, force, and knowledge of the subject, and I also admit that we have derived great assistance from the really able, temperate, and judicious argument of Baboo Mohinimohun Roy on behalf of the widow (special appellant).

I have had the advantage of reading the judgment which the Chief Justice is about to deliver, and his opinion, so far as it is stated in that judgment, has my entire concurrence—that is to say, I consider that the reasoning of the referring Judges is fully answered by that judgment; and that, if we were obliged to base our decision of this appeal upon the passages quoted from the ancient Hindoo sages and the several digests

or systematic books, I should hold for the reasons there given that the widow did not forfeit the estate which has once devolved upon her by reason of subsequent unchastity.

The whole of the passages examined, with one exception, to which I shall presently advert, seem to me applicable to wives and widows whose known or suspected incontinence debars them from succeeding to the estate of their husbands, and the impression left on my mind from the perusal of those texts and quotations is that the ancient Hindoo law was vigilant against the succession of wives who were unworthy to succeed, but did not enjoin or sanction an enquiry in the interests of reversioners, whether or not women, chaste at the time when the succession opened, afterwards maintained a blameless character.

The exception to which I alluded is the second verse of the text of Catayana, quoted as text CCCCLXXVII., b. v., ch. ix., s. 1 (Colebrooke's Digest, vol. iv., pp. 277-8, folio edition, 1798), where it is said: "The "childless widow, preserving inviolate the "bed of her lord and strictly obedient to her "spiritual parents, may frugally enjoy *the* "*estate* until she die; after her the legal heirs "shall take it."

This text does appear at first sight to require chastity as a condition of enjoyment; it also requires obedience to her spiritual parents, but it contains no express authority to deprive her if unchaste or disobedient; on the other hand, it provides that, *after her* (without adding *or in case of her failing* to comply with the conditions), the legal heirs shall take it.

It will not be now contended that she could be deprived for an act of contumacy towards her spiritual parents; as far as the text goes, it must, I think, be taken as a whole, and so far as the sanction goes of a law emanating from authority regarded as divine, if the breach of one clause will not deprive, no more will a breach of the other.

To the argument derived from the sanctity of the marriage-tie I will advert presently, but for the moment we are dealing with the absolute commands of the lawgivers, and not with the considerations on which those commands were probably founded.

In other passages cited, such as that of Bridha Menu, in text CCCCVIII. of the same volume, Colebrooke's Digest, it is declared that a chaste sonless widow, "who strictly performs the duties of widowhood," shall alone succeed to his whole share.

What those duties are if the widow elects to survive her husband, may be read in Colebrooke, b. iv., ch. iii., s. 2, from which it appears, amongst other things, that a widowed woman sleeping on a bed would cause her husband "to fall from a region of joy," and it would be monstrous to contend that a widow who took a second repast in the day, who failed to keep her tongue in subjection, or who omitted fasts, pilgrimages, and utterances of the name of Vishnu in the month of Bysack, or of Kartick, would, by any of these acts or omissions or all of them together, forfeit her estate.

The Hindoo Shastras then appear to me to fall short of requiring the forfeiture contended for by the respondent, and the attempt to transmit into a positive rule of law affecting the enjoyment of property, that which is to be found there in the way of precept, would only involve us in endless absurdities.

But I go further. I cannot concede that the Courts of this country are bound to enforce, or would be justified in enforcing the principles of the Shastras, merely as such by way of property law, and I say this quite irrespectively of the British or foreign origin of those Courts, or of the element which our Legislature has introduced into the law of India. I say it, too, bearing fully in mind the rule laid down in Regulation IV. of 17[illegible] section 15 (which was in force when this case was before the lower Courts), to the effect that, "in suits regarding succession, inheri"ance, marriage, and caste, and all religious "usages and institutions, the Mahomedan "laws with respect to Mahomedans, and "the Hindoo laws with regard to Hindoos "are to be considered as the general rule "by which the Judges are to form their "decisions." That rule has now been replaced by section 24, Act VI. of 1871, the Bengal Civil Courts Act.

It was for the purposes of this argument I think, tantamount to the declaration contained in s. 17, 21 Geo. III., ch. 70, that in disputes between the native inhabitants of Calcutta, "their inheritance and succession "to lands, rents, and goods, and all matters "of contract and dealing between party and "party, shall be determined in the case of "Mahomedans by the laws and usages of "Mahomedans, and in the case of Gentoos "by the laws and usages of Gentoos."

Regard being had to the remote antiquity of the Shastras to their vulgarly-accepted sacred origin and immutable character, and to the changes, nevertheless, sweeping and progressive in the constitution and condition of

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Hindoo society during the centuries since Nareda and Menu wrote, to the fragmentary state, the obscure and too often, conflicting tenor of these writings, finally, to their inapplicability, even at the time of their composition, to the whole people—regard, I say, being had to these things, I conceive that we must act upon the Shastras, in dealing with property and judiciable rights, only so far as they are sanctioned and continued by the usage and custom of the people.

This is not merely my own opinion; if it was, I should scarcely venture to advance it; but is the opinion of persons whose competence to speak will not be denied. Sir Henry Maine, in his Ancient Law, p. 17 (Ed. 1863), observes: "The Hindoo Code, called the Laws of Menu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is that it does not, as a whole, represent a set of rules ever actually administered in Hindoostan.

"It is, in great part, an ideal picture of what which, in the view of the Brahmins, *ought* to be the law."

Mr. Steele, in the preface to his valuable work on the "Law and Custom of Hindoo castes" (new Ed., 1868) quotes from a minute of the Governor of Bombay (no less an authority than the Hon'ble Mountstuart Elphinstone), dated 22nd July 1823: "The Dhurm Shastra, it is understood, is a collection of ancient treatises, neither clear nor consistent in themselves, and now buried under a heap of more modern commentaries, the whole beyond the knowledge perhaps of the most learned Pundits, and every part wholly unknown to the people who live under it. Its place is supplied in many cases by known customs, founded indeed in the Dhurm Shastra, but modified by the convenience of different castes or communities, and no longer deriving authority from any written text." It was the inquiry into these customs, made under the orders of the Government of Bombay, that resulted in the publication of Mr. Steele's interesting book; and one cannot help regretting that further efforts have not been made in this direction at Bombay and other places. It is useful and instructive to observe in many particulars the divergence of custom from the written law,* and some such instances are summarized by Mr. Lyon of the Bombay Civil Service in a very useful work recently published, called the "Law of India," Vol. I., p. 13.

Mr. Burnell, in his Introduction to the Translation of part of the Madhavajee Commentary (Dayavibhaga, p. 13), uses the following language: "The digests, however, "were never intended to be actual codes of "law; . . . . . there is not "a particle of evidence to show that these "works were ever even used by the Judges of "ancient India as authoritative guides; they "were, it is certain, considered as merely "speculative treatises, and bore the same relation to the actual practice of the Courts, as in "Europe treatises on Jurisprudence to the law "which is actually administered." And so West and Bühler, in their Digest of Hindoo Law, Introduction, p. 36: "It is, therefore, unreasonable to charge the Smriti "'codes' with a want of precision and of discrimination between moral and legal maxims, "&c. Such strictures would only be justified if they were really 'codes' intended "from the first to settle the law between man "and man."

I would also refer to the observations on a very similar question which arose in the Supreme Court of Bombay in 1847, before Perry, C.J., to be found in 2 Morley, p. 431, in the case of the Kojas *vs.* Memons of Cutch.

The parties there were Mahomedans, and a practice was set up quite at variance with Mahomedan law, and being found to prevail among these people, it was maintained. In that case the plaintiff sued, as a daughter, for a share in her father's property. In answer it was set up that, according to the custom peculiar to the Koja sect, daughters were excluded from inheritance.

The case was fully argued and allowed to stand over for judgment. In the meantime another case of the same description arose on the part of some persons of the Memon Cutchee caste, in which it was intimated that exactly the same question was involved, and Sir Erskine Perry, in passing judgment in the case, makes the following observations: After reading the following clause of the Charter of the Bombay Court: "In the "case of Mahomedans or Gentoos, their "inheritance and succession . . . shall be "determined, in the case of the Mahomedans, "by the laws and usages of the Mahomedans; "and where the parties are Gentoos, by the "laws and usages of the Gentoos, or by such "laws and usages as the same would have been "determined by if the suit had been brought, "and the action commenced, in a native

* See upon this very question pp. 35 and 176.

"Court." He says: "Now, if the meaning "of this clause is that it is an absolute enact-"ment or adoption of the Koran as of a posi-"tive unchangeable law without regard to "what the usages of the Mahomedans of India, "whether *Shiás*, *Sunnys*, or sectarians, might "have been, undoubtedly the custom set up "in conflict with the text of the Koran cannot "be sustained. But I think it is quite clear "that the clause in question was framed "solely on political views, and without any "reference to orthodoxy or the purity of "any particular religious belief." In a further passage he says: "I am clearly, there-"fore, of opinion that the effect of the "clause in the Charter is not to adopt the "text of the Koran as law any further than "it has been adopted in the laws and usages "of the Mahomedans who came under our "sway; and if any class of Mahomedans, "Mahomedan dissenters as they may be "called, are found to be in possession of any "usage which is otherwise valid as a legal "custom, and which does not conflict with "any express law of the English Govern-"ment, they are just as much entitled to the "protection of this clause as the most "orthodox *Sunny* who can come before the "Court" Again: "It should also be fur-"ther observed that these Mahomedan "sectarians have lived chiefly in countriés "reigned over by Hindoo Princes; and I "can have no doubts whatever on the evi-"dence, and on what we know of the manner "in which native Courts dispose of the con-"troversies of their subjects, that, if the "present suit had been brought before the "Rao of Cutch, or any of the Rajput Rajahs "of Kattiwar, upon payment of the dues of "office, the 25 per cent., or whatever the "exaction might be, the decision would have "been in conformity to that which is "reverenced by all mankind, but by Hindoos "perhaps more than any other of mankind, "ancient usage. If this be the true exposi-"tion of the rule which would be meted out "to these people in their own country, it "would be a monstrous thing that an English "Court of Justice should be obliged to "reverse such a time-honored custom, and "almost to revolutionize the internal economy "of two whole castes out of some supposed "obligatory force in a text called divine, "which neither the Judge nor the parties to "the suit believe in."

It does not appear that this decision was ever appealed against.

It would be a stupendous effort of legislation to combine into one mass the whole body of Hindoo jurisprudence, and to eliminate all that was false or unsuited to the times, to amend that which was defective, supply what was wanting, and re-enact the whole into a great scheme of modern Hindoo law; but no such task is likely to be attempted.

Our duty, I take it, is very different: we have only to administer the living Hindoo law, and we are not to deprive parties of their property through the operation of rules framed by ourselves in supposed accordance with its abstract principles.

I wish, however, emphatically to say that it is far from my intention to question or to undermine the original authority of the Hindoo Shastras. Near 30 years spent in the public service in this country have not taught me to undervalue the great sources of law of usage, and of morality from which millions of Her Majesty's subjects derive their rules of daily conduct. And I know in what eloquent and impressive terms the duty of maintaining those fountains of law has been proclaimed by men of the highest eminence as statesmen and as scholars. But I find believe that such declaration has been rightfully, and in fact, based upon the assumption that the laws so to be protected are not only regarded by the Hindoo community with superstitious respect, but also endeared to its members by long and unbroken observance.

A rule of Hindoo law in which the Courts are bound to act, and may act with safety will, therefore, I conceive, be found to originate in the Dhurm Shastras, to be extracted and embodied in the great comparatively modern law treatises, such as the Mitakshara, the Dayabhaga, and others, and to have come down to present times preserved in the usage of Hindoo society, and occasionally enforced by the action of the Courts. And many of the rules in most frequent requisition—those for instance of succession, partition, and adoption—will bear this test very well: cases being of frequent occurrence, the Shastras and the Hindoo law books being constantly appealed to, and the Courts having applied themselves with much diligence, and some success, to the work of interpretation, especially of late, when a reasonable, instead of a servile or literal, mode of construction has begun to be adopted. In the case of Koer Golab Singh *vs.* Rao Kurun Singh, B. L. R. Vol. X., p. 10, their Lordships in the Judicial Committee say: "It is entirely opposed to "the spirit of the Hindoo race to allow the "words of the law to control its long-received "interpretation, as practically exhibited by

les of descent and rules of property unded on the decisions of the Courts of e country, and it seems to their Lordships at it would be extremely mischievous to sturb, upon points taken here for the first me, any such course of decision."

Let this mode of investigation be applied he present controversy, and let us see the lt.

It may, in the first instance, be conceded, that, previous known incontinence will ude a widow from succession; *2ndly*, that idow *receiving maintenance* loses her t thereto by subsequent profligacy.

The first of these positions was admitted he appellant's pleader; it is not only from the books, ancient and modern, also it would seem to be supported by ice and by the decisions of the Courts h have been cited. The other rule is distinctly laid down, is fully recognized, is in accordance with reason and justice; man cannot be bound to feed miscon- in his own family, or to recognize a bond ion which the widow herself has tram- under foot.

nceding these points, we exclude the rities which go to support them and rther, and then what do we find bearing e point at issue? An obscurely worded ragmentary religious precept, no positive tment of forfeiture, no evidence of om, unfrequent resort to Courts, and in only cases where, so far as we can see, question was really raised and decided, cision in favor of the widow.

the most recent case there is the con- ent opinion of the late Chief Justice and o other Judges of this Court, and this ion the learned Judges who refer this feel themselves bound to say is "con- to the Hindoo law."

should not venture to say so, and I do think so, and of course by the "Hindoo " I mean that Hindoo law which we bound to administer. As to its being ary to the principle and spirit of Hindoo I shall say something further on.

have just asserted that the Hindoo law s contained no positive declaration of iture in such cases. The only thing of kind suggested was the remark of Sree- on Turkolunkar, quoted at p. 13 of the ring judgment: "*Shadhee* (chaste) rwise the right ceases." This, I think, well explained by Baboo Mohini- un Roy in his reply. Sreekissen does appear to say anything of the kind in own treatise (the Dayakrama Sangraha), and certainly the phrase "cessation of right" is a different thing from "forfeiture of property."

As to Juggernath Turkopunchanun, admitting fully his vast and noted erudition, I do not think he would be a safe guide for the Courts, on the strength of his own opinion, upon such a matter. He seems, indeed, to be, like many of the writers on Hindoo law, a merely learned person, neither Judge nor lawyer, but Pundit and logician, and without their merit of being accurate and precise.

But it has been said that this question cannot be viewed apart from the religious element in the Hindoo law; that, by the Hindoos, marriage is regarded as a sacrament, the foundation of the family, and therefore of society; that it was one of the chief aims of the Hindoo legislators to preserve the purity of the conjugal relation; that with this view restraints were imposed on the weakness of women, forfeiture of property being one of them; and that the removal of these restraints, without substituting better ones, would be a dangerous innovation.

I have said before that it would not, in my opinion, be an efficient or proper check upon a weak and thoughtless woman to put it in the power of her husband's relations to obtain the transfer of her property to themselves on proof of her frailty.

I am not aware that the Hindoo system is at all peculiar in its tenderness towards the marriage tie, and if Hindoo women differ from others in being weaker and more ignorant, that, it seems to me, is a reason for pity, and not for harshness.

But how does the case really stand? Let those who would enforce in the case of Hindoo wives and widows all the duties and all the penalties of the Shastras consider what Hindoo marriage was in the days, and among the people, in which and for whom those books were written, and what it is now.

Those were not the days of child marriages, or of Koolin marriages.

Professor Wilson says (2nd vol., Essays on the Religion of the Hindoos, pp. 58-9): "The Vedas then did not sanction the "marriage of children. In fact, it was "impossible for a man to marry before "maturity . . . at the earliest he could "not have been married before he was seven-"teen—an early age enough in our estima-"tion, but absolute manhood as compared "with the age of nine or ten at which "Hindoo boys are, according to the present "practice, husbands. There is no doubt that

"many other innovations for the worse have "been made in the marriage ritual and "usages of the Hindoos, and the whole sys-"tem, the premature age at which the parties "are married, the practice of polygamy, and "the circumstances under which the alliance "is commonly contracted, involving the utter "degradation of the female sex, is equally "fatal to the development of the moral "virtues and intellectual energies of the "man, and is utterly destructive both of "public advancement and domestic felicity." And although Professor Wilson does not say so, neglect of a wife by her husband in respect of the connubial relation was not permitted, but was declared to be "punishable according to law." I do not cite the passage, but it may be found in the 2nd vol. of Colebrooke's Digest.

All this, however, would seem to be thought of no consequence as long as an extreme penalty is reserved for the punishment of an erring woman, whose education left her frail and ignorant, and whose married life has made her miserable.

No doubt, there will be many cases to the contrary, and a Hindoo wife may be as happy as another. That is true, but those are not the cases in which after-misconduct is most to be apprehended, nor will the Court be at liberty (if it must obey the Shastras, and the Shastras so require) to choose the instances in which the penalty is to be inflicted.

The child-widow must be true to the boy-husband who never reached the age of puberty.

The Koolin's wife must "preserve unsullied the bed of her lord," which perhaps she has never seen, or has shared with co-wives to the number of five or fifty.

To be sure, Koolin husbands are commonly *ex-necessitous* gentlemen, and it might not be worth their relation's while to maintain a watch over the morality of their widows.

It may be argued that a widow who leads an immoral life ought not to be placed in a better position than one who honestly takes the benefit of Act XV. of 1856, and, in so doing, renounces all rights in her deceased husband's property. But the Legislature as to this last provision was simply in accord with native custom as shown by Steele at p. 176 of the book already cited, and it would certainly be a severe shock to native opinion, that a widow by re-marriage should be able to carry away her first husband's property into a strange family, neither his nor her own, and besides, by re-marrying, she acquires certain rights, or probable rights, in the estate of her second husband.

If those who advocate the widow's forfeiture for incontinence do so merely in the interests of morality, it seems to me they would best accomplish this end by inducing the Legislature to punish with fine and imprisonment the *men* who bring shame upon Hindoo families, which course would be infinitely juster than visiting it on the widows.

I will only add a few words as to my view of the effect of Act XXI. of 1850 on the present question. The Act provides for the cases of those who (1) have renounced, or (2) have been excluded from the communion of any religion, or (3) have been deprived of caste—meaning, I conceive, those who by their own choice, or by the action of their caste fellows, have been finally shut out, or temporarily deprived, though capable of being restored on the making of proper expiation.

I have already remarked that the extensive changes in public usages, manners, and feelings have gradually produced, in certain matters a wide gap between existing facts and the Hindoo law, which, like those of the Medes and Persians, changes not, being reputed divine.

It may well have seemed to the Legislature that, as many injunctions and many penalties had become obsolete, those which remained in force would be found to be distinctly marked as retaining their force in popular estimation by the simple, but effectual brand of outcasting, and that it would not be attempted to enforce any loss of civil rights without first resorting to the tribunal of social opinion, and putting the offender out of caste, and, in fact, that such loss of caste, and in the misconduct by which it had been occasioned, would be usually insisted upon in working the forfeiture. But we need not consider now whether this speculation is correct or no.

On the grounds I have already stated, as well as those assigned by the Chief Justice and generally by my brethren who are of the same opinion, I think that in this case the widow does not incur a forfeiture by reason of her incontinence.

Kemp, J.—On the questions referred to this Bench by the second Bench, I concur entirely in the referring judgment and in that just delivered by Mr. Justice Mitter. I can add nothing to those judgments, but I wish, as Mr. Justice Glover has done, to guard myself from its being supposed that I concur in that portion of the learned Judge's

judgment of reference which limits the enjoyment of the widow in the estate of the husband. I do not take the limited view which Mr. Justice Mitter takes of the estate of a Hindoo widow, and I concur with Mr. Justice Glover in his remarks as to the extent of that estate, although that was not a question referred to this Bench.

In every other respect, and with due deference to the opinion of the learned Judge in so far as the enjoyment of the estate of her husband by the widow is concerned, in which I cannot concur, I entirely agree with Mr. Justice Mitter.

Couch, C.J.—In this suit the following question has been referred to the Full Bench: "Whether, under the Hindoo law as administered in the Bengal School, a widow, who has once inherited the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity." Up to the time of the reference there had been no conflict of decisions in this Court, the only case being Srimati Matangini Debi *vs.* Srimati Joy Kali, 5 B. L. R. 466, where the decision of Mr. Justice Markby, that a widow did not forfeit her right, was affirmed by the Chief Justice, Sir Barnes Peacock, and Mr. Justice Macpherson. But the learned Judges who have referred the question state that they feel themselves bound to say that that decision is contrary to Hindoo law, and we are, in effect, asked to overrule it. The authorities bearing on the question, and the reasons for an opposite decision, are very fully and elaborately stated by Mr. Justice Mitter in the referring judgment.

I propose first to consider that judgment, and will afterwards refer to any authorities and arguments that have been produced which are not in it. It first notices that the authorities in the different schools of Hindoo law appear to be unanimous in holding that an act of unchastity is one of the gravest delinquencies of which a woman can be guilty. The texts cited need not be repeated here, and it may be allowed, as the judgment says, that "they are in full unison with the feelings of the Hindoo community in general, and that the social *status* and privileges of Hindoo women are still ordinarily determined and regulated by them." They may be, as is also said in the judgment, valuable guide in the present discussion, but it must be kept in mind that the question is what is the doctrine that has been received by the Bengal School, by the law of which the case is governed, and that has been sanctioned by usage.

It is then remarked that the estate of a widow under the Hindoo law is one of a very peculiar character; which is now so fully understood and admitted that I need not refer to the authorities upon it. And then it is said: "Indeed, according to the true theory "of the Hindoo law, she is nothing more "than a trustee for her life for the soul of "her deceased husband, if we may use the ex-"pression." The words "if we may use the expression" show that the learned Judges felt they were speaking figuratively, to which there can be no objection if care is taken to distinguish the figurative from what it resembles, and not in reasoning to substitute the former for the latter. I may here quote the words of Lord Westbury in Knox *vs.* Gye, L. R., 5 E. & I. Ap. 675: "Another source of error in this matter is "the looseness with which the word 'trustee' "is frequently used. The surviving partner is "often called a 'trustee,' but the term is used "inaccurately . . . . . It is most necessary "to mark this again and again, for there is "not a more fruitful source of error in law "than the inaccurate use of language. The "application to a man who is improperly, "and by metaphor only, called a trustee, of "all the consequences which would follow if "he were a trustee by express declaration, "in other words, a complete trustee holding "the property exclusively for the benefit of "the *cestui-que-trust*, well illustrates the "remark made by Lord Mansfield, that "nothing in law is so apt to mislead as a meta-"phor." But, in truth, the word "trustee" ought not to be used, at least in the sense which is ordinarily attributed to it, and if used in any other, it proves nothing. A widow is not a trustee. She has the usufruct as well as the property in the thing inherited from her husband. Thus Vyasa, as quoted in the judgment, says: "For women the "property of their husbands is intended only "*for use;* let them not make waste of it on "any account." And the text of Catayana also quoted is: "Let the childless widow "keeping unsullied the bed of her lord, and "abiding with her venerable protector, enjoy "with moderation the property after his "death."

It is true that Sir William Macnaghten, in his Principles of Hindoo Law 20, speaking of the estate to which a widow succeeds, says: "She can be considered in no other "light than as a holder in trust for certain "uses;" but he goes on to say that should she make waste, they who have the reversionary interest have clearly a right to restrain her

from so doing, not that, by making waste, she forfeits her estate.

It is then remarked that "it should not "be supposed that these provisions were "intended by their framers as mere moral "precepts which the widow is at liberty to "obey or disobey at her pleasure; on the "contrary, the utmost precaution is taken by "them to secure their strict enforcement." But, as there is no text that if she disobeys she shall lose her property, it may be inferred that it was not intended she should. Texts are then cited to show that, in the disposal of her property and care of her person, a childless widow is subject to the control of her husband's family, and the widow's estate is compared with that of a male heir under the Hindoo law. In both cases the spiritual welfare of the deceased proprietor is the only test resorted to for determining the right of succession, and it is remarked that no effective restriction whatever is put upon the right of enjoyment of the male heir; that the reason for this distinction between male and female heirs is that women are incapacitated from performing the ceremony of *purvana* shrad, which constitutes, as it were, the very corner-stone of the Hindoo Law of Inheritance. This applies to all female heirs; and we are asked, in the absence of any positive text, to make a distinction between the widow and other female heirs, and to declare that she is to forfeit her estate if she fails to perform her duties, whilst they do not. But it has not been attempted to be shown that there is more reason for the widow to forfeit the estate on account of unchastity, and because her acts are thenceforward inefficacious for the repose of her husband's soul, than for an unmarried daughter to forfeit the estate upon the death of a childless husband, with whom, after her father's death, she may have intermarried, and by whose death, childless, she ceases to be efficacious in bestowing benefit on her father's soul.

The widow chaste at her husband's death takes as "half her husband's body," and for performing works efficacious for his soul. The daughter unmarried at her father's death takes, because she is "as it were himself," Dayabhaga, ch. xi., s. 2, v. 1, and because she is, equally with the son, "a cause of perpetuating the race," and, v. 7, "confers benefit on her father by means of her son." It is clear from v. 30 that the issueless widowed daughter, in whom as a spinster the estate had vested, would retain it until her death, although after her husband's death she would be wholly inefficacious to confer the benefits for which she had been selected to take. If it be said that she may still continue of herself to perform certain acts efficacious for her father's soul, the answer is that those qualities are not the qualifications or conditions for her selection to take the estate. Had she been a childless widow at her father's death, she would have been passed over, notwithstanding the possession of such qualities. The reason for her taking the estate is, not the efficacy of her own acts, but the efficacy of the acts to be wrought through her son. It is then observed in the judgment that, if we were to guide ourselves solely and exclusively by the texts in the Mitakshara and Dayabhaga, it would have been extremely difficult to come to any satisfactory solution of the question one way or the other. In fact, as is said by the Judicial Committee of the Privy Council of the texts in the Mitakshara, they are wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. If the doctrine contended for has been received, it must have been originated by later commentators. I pass over the remarks upon the Full Bench decision; but I think it would be very difficult to reconcile it with what we are now asked to declare to be the law. It has been so generally acted upon that we must consider the decision to be the settled law, unless the contrary is declared by a higher tribunal. The judgment then says: "Such then being "the nature of the estate inherited by a "Hindoo widow, every act done by her, the "effect of which is to incapacitate her from "using that estate for the only purpose for "which she is entitled to use it, operates as a "cause of forfeiture;" and after citing texts which show "that an unchaste woman not only "causes 'the loss of her husband's soul.' "she is totally incompetent to redeem it afterwards, inasmuch as every act done by her "subsequent to the loss of her chastity must "necessarily destitute of all religious efficacy "whatever," it says, "as half the body of "her deceased husband, she took it as a trust "for the benefit of his soul; but, if she is no "longer in a position to fulfil her duties as "such trustee, the trust-property must be "taken away from her as a matter of course."

I will consider these two propositions separately. The first assumes that the continuance of the estate in the widow is conditional upon her using it for the intended purpose, otherwise the incapacity would not cause a forfeiture; for it is not said that

the forfeiture is to be considered as a punishment. And no text has been produced to show that it can be regarded in that light. But whether the estate is a conditional one is the question we have to determine; and it is admitted that the texts under which the widow takes the estate are silent as to her disabilities, or the nature of the interest which she takes. In the Mitakshara, ch. ii., s. 1, v. 6, the following texts are given: "The widow of a childless man keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share"—Bridha Menu. "The wealth of him who leaves no male issue goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother"—Bridha Vishnu. "Let the widow succeed to her husband's wealth, provided she be chaste; and in default of her, the daughter inherits if unmarried"—Catayana. Chastity is declared to be the condition of her taking the estate; but there is no condition declared to her keeping it.

The second proposition uses the word trustee, and asserts that, if a trustee is not in a position to fulfil his duties, the trust-property must be taken from him as a matter of course. This is intended as a proposition of Hindoo law; no authority is cited in support of it, and I am not aware of any. As a doctrine of Courts of Equity in England, it is not correct. The remedies for a breach of trust are stated in a work of high authority, Lewin on Trusts, ch. xxvii.: But the taking away the trust property is not among them; and it has been found necessary to provide for the disability of a trustee by infancy or lunacy by Acts of Parliament. There appears to me to be a fallacy in the proposition. The possession of the trust-property is not essential to the performance of the duties. If the widow has sufficient property of her own to maintain herself, she might alienate the whole of her husband's property for her life, and still perform all her duties for the benefit of her husband's soul. In fact, there is no trust attached to the property. It is a personal obligation on the widow, and the proposition only is, that if she does not fulfil it, she will be deprived of her estate. We must see whether that is a received doctrine in the Bengal School of Hindoo law. It is then clear that the conclusion, that the estate must be taken away from her as a matter of course, without wanting an express authority to support it; and texts are cited which show that it is only a chaste widow who is competent to perform the religious and other acts conducive to the spiritual welfare of her husband. Also a text of Vyasa is cited, which says: "After the death of her husband, let "the virtuous widow observe strictly the duty "of continence; and let her daily, after the "purification of the bath, present water from "the joined palms of her hands to the manes "of her husband," and enumerates other duties. "It is clear," says the judgment, "that, "according to the author of the Dayabhaga, "there are two reasons for allowing the widow "to succeed to the estate of her deceased hus-"band, namely, *first*, because she can rescue "him from hell by living in the mode pre-"scribed by the Hindoo Shastras; and, *second-"ly*, because she might cause his soul to fall "into a region of torment by doing improper "acts through indigence." Let this be granted. The reasons for allowing a person to succeed to an estate are not necessarily the conditions upon which he is to hold it. In the case of the male Hindoo heir, it is admitted they are not. And the description of the person who is qualified to succeed to an estate has not the force of a condition by which the estate will be defeated if the qualification afterwards ceases; as is before shown in the case of a daughter becoming an issueless widow. The last text referred to is from Catayana cited in the Dayabhaga: "Let the childless widow preserving unsul-"lied the bed of her lord, and abiding with "her venerable protector, enjoy with moder-"ation the property until her death; after "her let the heirs take it." This may, no doubt, be read as making the enjoyment conditional on keeping unsullied the bed of her lord; but it may also be only an injunction to do so, as in the text of Vyasa: "Let "the virtuous widow observe strictly the duty "of continence;" and the way in which it is used by the author of the Dayabhaga seems in favor of this. The passage, ch. xi., s. 1, v. 56, begins: "But the wife must "only enjoy the husband's estate after his "demise. She is not entitled to make a gift, "mortgage, or sale of it. Thus Catayana says, "&c." If Mr. Colebrooke had thought that the words of Bridha Menu and Catayana were intended to make the enjoyment of the estate conditional, I think he would have made it clear in his translation that it was so. If the injunction is to have the force of a condition, and the violation of it is to cause a forfeiture of the estate, the Full Bench decision cannot be supported; because the whole estate of the widow would be forfeited

by an alienation, and the heirs would take it. I think this text cannot be considered as a declaration that the enjoyment of the estate is subject to the condition of remaining chaste. The decision of the Privy Council, at p. 97 of the Vyavasta Darpana, does not appear to me to give any support to the opposite view. The next friend of the widow, an infant, sued to have the property belonging to her husband. She had removed from the protection of her husband's family, but it was not pretended that she had done so for unchaste purposes. The only question that could be put to the Pundits was, whether by ceasing to reside with the family of her husband, she forfeited her right of succession. They could put their opinions upon no other ground. If their answer implies that the estate would be forfeited by unchastity, they went beyond the question put to them. It is certainly settled by that decision that one part of the injunction in the text is not conditional; and it follows from the form of it that the other part must receive the same construction. This applies also to the text from Bridha Menu. Some authorities current in the Bengal School are then cited. Of two of these, Sreekissen Turkolunkar and Rughoonunduna, I need only say that it does not appear whether they are speaking of the right to inherit or to keep the property after it has been inherited. A wife's right to inherit on the death of her husband may be said to cease on her becoming unchaste. Juggernath Turkopunchanun, the last authority cited. and one of the most modern of the Bengal School, is in favor of the doctrine that the interest of a widow is forfeited by unchastity. Of the texts which are then cited to prove that the Hindoo law goes to the length of declaring that a woman who is guilty of unchastity is liable to forfeit even her stridhun or peculiar property, it may be said that, if they do not prove that, they do not assist the argument. And if they do, the forfeiture is declared by positive texts, which shows that they were thought to be necessary. Also some of these texts seem rather to refer to acts in the husband's lifetime. As to the remark that, as an unchaste woman no longer remains half the body of her husband, her estate must necessarily come to an end, I think it may be said that the estate cannot be considered as still the husband's; otherwise a son would not take in preference to the widow. On the husband's death, the estate ceases to be his. The being half the body of her husband is the reason why the widow is preferred to a daughter.

The objection, which does not appear to me to be supported by authority, and has no weight in my opinion, that, according to the Hindoo law, an estate once vested cannot afterwards be divested, is met in the judgment by the introduction again of the trust; but here it is said that the estate is *in the nature* of a trust-estate, a change of expression which, I think, indicates some uncertainty in the minds of the learned Judges as to there being a trust attached to the estate. It appears to me that this idea of a trust pervades the whole of the judgment; and I think I have shown, not only that there is no real trust, but that, if there were, forfeiture would not be the consequence of it.

The judgment then discusses the decisions of Courts of Law and the opinions of European writers on Hindoo law. The first case mentioned is in the 2nd volume of Macnaghten on Hindoo Law, p. 20. It is stated that a person died, leaving a widow and brother of the half-blood, and, subsequent to his death, the widow violated the hitherto unsullied bed of her husband, and had a child by a paramour of another class, while the brother's conduct was consistent with the religion; and the question is put, which of the two is entitled to succeed to the property of the deceased? The answer is: "It is the "general doctrine that the virtuous widow "a man who dies leaving no heir down to "great-grandson succeeds; but that if she, "the death of her lord, be faithless to "bed, she has no right of succession: "sequently the widow in such case would "be excluded by her husband's half-brother." The words "she has no right of succession" must, with reference to the facts stated, be taken to mean that she loses or forfeits the estate; but it is open to the remark that the texts cited do not directly support the opinion. It is the deduction of the Pundit from them. The next case is at p. 21 of the same volume. In the question it is uncertain whether the widow had become a prostitute and had violated her husband's bed. before or after his death; and the answer is: "it be proved that the widow, in fact, did "keep her husband's bed unsullied, she "no title to his property, and ought to "expelled from his house." It is doubtful whether this is an authority upon the question now before us. The next case is at p. 112, where it is stated that the woman became pregnant after the death of her husband, the fruit of an adulterous intercourse. The answer is: "A virtuous widow of a p "son who leaves no male heir down to

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great-grandson succeeds her husband; and if she violate his bed, she becomes degraded. Consequently, the widow described has no right to her husband's heritage, and cannot claim her maintenance, even though she obtained an agreement for her subsistence previously to her offence." The texts of Vyasa and Catayana enjoining that a widow shall remain chaste are cited as the authorities. It is to be observed that it is said that she becomes degraded, and consequently has no right to her husband's heritage; and it seems to be considered that the loss or forfeiture of the estate is caused by the degradation or loss of caste. Indeed, it is possible that it was assumed in the other cases that there had been loss of caste. In the case in Sel. Rep. 144, a widow was held to have forfeited her claim to maintenance by living with a paramour. There was no question as to the forfeiture of an estate inherited from her husband, for there was an adopted son.

In the case in the Sud. Dew. Ada. Rep., 1858, p. 1891, the wife had eloped in the lifetime of her husband, and there is no doubt that the right of succession is forfeited by

As reported in Montriou's Rep. 314, the case of Doe *d.* Radha Monee Raur *v.* Nil Monee Doss* is an express decision by four Judges of the Supreme Court that a Hindoo widow forfeits her right to her husband's estate by incontinence after her husband's death. The report is very brief, and appears to have been taken from the notes of Chambers, J. It was decided in 1792, and is mentioned in the note to Doe *d.* Saum Monee Dossee *v.* Neemy Churn Doss, 2 Taylor and Bell 300, Mr. Montriou's Reports not having been published. The decision of Sir Lawrence Peel in the latter case seems to be founded on the assumption that the forfeiture is consequent on loss of caste, as he applies Act XXI. of 1850 to it. It seems probable that the opinion of Sir Thomas Strange was not the received doctrine in the Supreme Court. Mr. Colebrooke's opinion, in 2 Stange 272, is, no doubt, open to the remark made in the referring judgment, that it was given in a case which originated in Trichinopoly; nor does it appear that it was given with any reference to the authorities current in the Bengal School. But the case in 2 Macnaghten 112 is a Bengal case and the opinion there agrees with Colebrooke's.

* Montriou's Hindoo Law Cases 314.

Elberling 73 and 75 and West and Bühler 99 are cited as supporting the opinion of the referring Judges. Elberling, at p. 73, says: "The enjoyment of the property is "given her (the widow) upon two conditions: "1, that she remains chaste; 2, that she does "not make waste;" and at p. 75: "A widow "is to reside in her husband's family, yet as "she forfeits her right to the property only "by not remaining chaste, or by making "waste, the mere residing with her own "family cannot cause a forfeiture of her "right to the enjoyment of the property, if "it be not done for unchaste purposes." And he cites the text of Catayana: "Let the childless widow, &c." If Elberling be correct that the enjoyment of the property is conditional, it must be forfeited, as well by the breach of one condition as of the other; and upon an act of waste the estate of the widow would be determined, and the property would pass to the heirs of the husband. This, I believe, has never been held to be the law. In West and Bühler 99, it is said that a widow, having married herself to another husband by the "pât" ceremony, had forfeited her right of heirship; but at p. 299 the question is put: "A woman of the Dorik "caste, having lost her husband, became the "mistress of a man of (another) Soodra "caste, and had a daughter by him. Can "she claim to be the heir of her husband?" The answer is: "A woman who was chaste "at the death of her husband becomes his "heir."

The "remark" by the authors upon this is: "According to Strange, Elberling's Hindoo Law, adultery divests the right of a "widow to inherit after it has vested. On the "other hand, the Shastri's opinion seems to be "supported by the Viramitradaya, where it is "said, f. 221, p. 2, l. 8: 'And these persons "(those disabled to inherit) receive no share "only in case the fault was committed or "contracted before the division of the estate. "But, after the division has been made, a "resumption of the divided property does "not take place, because there is no authority "(enjoining such a proceeding).'" And, noticing the opinion of Colebrooke, they say the authorities quoted by him do not support the view that any forfeiture of property necessarily attends expulsion from caste. In the next page there is an opinion that "a "widow who re-marries cannot be considered "a faithful wife. She cannot, therefore, claim "the property of her first husband." It is difficult to reconcile these opinions. Another authority cited in the argument before us for

the respondent is Colebrooke's Digest, b. v., ch. ix., v. 484, which, read with the previous verse, says that a woman who takes delight in being faithless to the bed of her husband is held unworthy of property which has been promised to her by him as her exclusive property; and it was argued that *à fortiori* she would be of property inherited from her husband. There is a material difference between the two cases. Allowing that the word translated 'wife' means also 'widow,' the not giving that which has been only promised is different from taking away what the widow has actually succeeded to by virtue of the law of succession, and is in the enjoyment of. Mr. Burnell's translation from the Vyavahara Cunda of the Madhavaya, p. 31, was cited. The passage appears to refer to the succession of the wife on her husband's death, and not to her subsequent enjoyment. The judgment of the Privy Council in Kasheenath Bysack *v.* Horosoonderee Dossee, Vyavasta Darpana 97, was relied upon as showing that the decision in Montriou's Reports was considered as law; but the question of forfeiture by unchastity did not, as I have already remarked, arise in the case; and it was sufficient for the Judicial Committee to say that the widow did not forfeit her right of succession by removing from the brothers of her late husband.

In a case in IV. Bom. H. C. Rep., A. C. J., 25, also cited, the Court held that, if the inheritance be once vested in the widow, it is not, by Hindoo law, liable to be divested, unless her subsequent incontinence be accompanied by "loss of caste unexpiated by penance, and unredeemed by atonement," citing 1 Strange Hin. Law, and adopting the words in p 136, and referring to Mr. Sutherland's opinion, Vol. II. 269, that the degradation is the cause of exclusion from inheritance. It was argued that, as maintenance is forfeited, the estate of the widow should be also. But the text of Nareda is: "Let the brothers "allow maintenance to his(deceased's)women "for life, provided these preserve unsullied "the bed of their lord; but, if they behave "otherwise, the brethren may resume that "allowance"—Vyavasta Darpana 29. And in Mr. Burnell's work, p. 30, a text of Nareda is given: "If any one among bro-"thers dies or renounces worldly affairs "(*i. e.*, becomes a religious mendicant), and "leaves no issue, the rest may share his pro-"perty, except the stridhun, and let them "support his wives as long as they live if "they preserve undefiled the bed of their "husband; but from others they may resume "it (the stridhun)." Thus we have, in this case, an express text authorizing the resumption. The absence of any text authorizing the heirs of the husband to resume the estate after the widow had succeeded to her deceased husband's property is relied upon as showing that it cannot be divested. And this argument is strengthened by the fact that in another case there is an express text.

Besides, the argument drawn from these texts is founded on an alleged, but false, analogy between a widow's estate and a widow's maintenance. In the former case the estate is given to her by express words, and is nowhere expressly taken away, and whilst hers, it is independent of other ownership, her enjoyment being only, according to the texts, subject to the advice or control of her male relatives. But maintenance is not so much a right in the estate of another, as a duty of that other to be performed towards all those who, but for the intermediate existence of himself, might be entitled to the estate. "Let them allow a maintenance" assigns a duty to the owner rather than a right to the widow, although such duty may be enforceable by a widow who is without reproach. Moreover, the verses, Mitakshara, ch. ii., s. 1, v. 37, and Mayukha, ch. iv., s. 8, v. 2, would seem to show that even the incontinent widow of one, who has actually possessed the estate, is entitled to maintenance for her life.

It was argued that in the Benares School property inherited by a woman from her husband is classed among stridhun, and therefore these texts would apply to it. And that it is the same in the Mithila School. Whether this be so according to the Mitakshara is at least doubtful. The contrary has been held by the High Courts both at Madras and Bombay, 2 Mad. 291-2; Bom. H. C. Rep. 14; and apparently in the Privy Council also, 11 Moore's I. A. 487. It is certainly not so in the Bengal School, by the law of which we are to be governed in this case." I think I have now noticed all the arguments and authorities produced on the part of the respondents, and most of those for the appellant, the argument for whom was rested mainly upon the absence of any text that the estate of the widow should be divested if she became unchaste. And also upon this, that, although by the Hindoo law there are various causes of exclusion from inheritance (Dayabhaga, ch. v.) when the estate is once vested, it is not forfeited by the subsequent existence of any of them. In a case in the S.

D. A. Rep. for 1854, p. 244, it was held that a person, who has once succeeded to property, is not to be dispossessed of it if he subsequently becomes insane. It was urged by the respondent's pleader that there being no positive text governing the case, we must look to the principles of the law to guide us in determining it, and that the five texts afforded ample analogy, quoting the words of the Judicial Committee in 9 Moore's I. A. 608. There the question was how the property descended, and it was absolutely necessary to determine it. Here the estate is by positive texts vested in the widow, and there is no necessity to determine that it shall be taken away from her, or to go beyond what has been declared by the texts to be the law. I think we are not at liberty to declare a doctrine, which is not shown to have been received and sanctioned by usage, to be the law, because it may seem to be analogous to a doctrine that has been received. Giving to the effect they deserve to the arguments founded upon the *status* of women under the Hindoo law and the peculiar character of a Hindow's estate, I still am of opinion that the estate once inherited is not forfeited simply by unchastity.

I therefore answer the first question in the negative, and it is unnecessary to answer the second.

Macpherson, J.—I concur in the judgment of the Chief Justice.

Pontifex, J.—I concur in the judgment of the Chief Justice.

Ainslie, J.—I concur.

The 4th April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Execution—Refund of Excess Payments—Act XXIII. of 1861, s. 11.

Case No. 737 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 19th February 1872, affirming the decision of the Moonsiff of that District, dated the 28th August 1871.

Mothoora Pershad Singh and others (Defendants), *Appellants,*

versus

Mohunt Shumbhoo Geer (Plaintiff), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Sreenath Doss* for Appellants.

Mr. R. T. Allan and *Baboo Kalee Kishen Sen* for Respondent.

A judgment-creditor having caused certain property of his judgment-debtor to be sold in execution, the proceeds realized did not amount to the full judgment-debt. Afterwards the judgment-debt was reduced in appeal to a sum far below the amount realized in execution, and the judgment-debtor brought a suit to recover the excess moneys.

HELD, with reference to Act XXIII. of 1861, s. 11, that the suit did not lie, but that the Court, which was charged with the execution of the decree, had full jurisdiction to determine the question, and order a refund.

Phear, J.—It appears in this case that the defendant was a judgment-creditor of the present plaintiff in a former suit, and in execution of his decree, he caused certain property of the present plaintiff to be sold; a portion of it to a stranger for Rs. 100, and the remainder to himself for Rs. 350. At that time the consideration-money for these sales did not amount to the full judgment-debt. Afterwards this Court, on appeal, reduced the judgment-debt to the small sum of Rs. 20, and the plaintiff brings the present suit to recover back from the defendant the excess moneys, which he says the defendant has been paid in execution of the decree in the previous suit beyond the debt of Rs. 20.

Both the lower Courts have given the plaintiff a decree in this suit.

It is objected before us on special appeal, amongst other things, that this suit does not lie, and we think we must uphold this objection.

It seems to us that, even apart from any legislative enactment, it may be open to question on the authority of similar cases in the English Courts, whether any good cause of action at law is disclosed by the plaint in the present suit. We understand that the plaintiff does not charge any wrongful conduct against the defendant, or allege that, in executing his decree for a larger amount than ultimately turned out to be due, he was in any way actuated by malicious or wrong motives. The plaintiff simply seeks to recover back from the defendant the money that the latter has overpaid himself by means of a regular process of execution, no step of

which is alleged to have been otherwise wrongful than that the decree executed thereby was afterwards diminished in regard to the amount awarded.

We think it is quite certain—placed as we may say by decisions of this Court beyond doubt—that, under circumstances such as those disclosed in this plaint, the Court which was charged with the execution of the decree in the former suit had full power, and it was its duty to order a refund of the excess moneys which the defendant had put into his pocket as the result of the proceedings in execution. It is to be observed that there is no need of a fresh trial properly speaking; the right of the present plaintiff to recover back the excess moneys is apparent on that which is already matter of record in the case.

It appears to us that, quite independently of any special legislation, not only has the Court, which, under these circumstances, is charged with the execution of the decree, as extensive a power to order restitution as it would have in an original suit itself to decree recovery, but that this is the place and occasion in which the judgment-debtor aggrieved ought to seek his remedy; and we think that an order to refund made by the Court on such an occasion would be an order for payment of money made with full jurisdiction, and, therefore, capable of being enforced under the provisions of Act VIII. of 1859. But, however this may be, when we turn to the words of section 11 of Act XXIII. of 1861, we think the matter is put beyond all doubt.

It seems to us impossible to say otherwise than that the question between the parties is a question relating to a sum alleged to have been paid in satisfaction of a decree, and if that be so, the section goes on to say that all such questions, and "any other "questions arising between the parties to the "suit in which the decree was passed, and "relating to the execution of the decree, "shall be determined by order of the Court "executing the decree, and not by separate "suit, and the order passed by the Court "shall be open to appeal."

We are therefore of opinion that this suit was brought in respect of a question between the parties to a former suit, which, by the words of section 11 of Act XXIII. of 1861, was made cognizable in the prosecution of that former suit, and not elsewhere or otherwise. It follows then that the decree of the Lower Appellate Court must be reversed, and the plaintiff's suit dismissed.

Under the circumstances, each party will pay his own costs in all the Courts.

The 5th April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Act XVI. of 1868, s. 12—Pending Cases—Jurisdiction — Execution-sale — Irregularity — Act VIII. of 1859, s. 256.

Case No. 788 of 1872.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 28th February 1872, reversing a decision of the Subordinate Judge of that District, dated the 5th October 1871.

Gobind Singh and others (Defendants), *Appellants,*

versus

Mohunt Munno Ram Doss (Plaintiff), *Respondent.*

Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose, and *Kalee Kishen Sen* for Appellants.

The Advocate-General and *Baboos Mohesh Chunder Chowdhry, Hem Chunder Banerjee,* and *Taruk Nath Dutt* for Respondent.

At the time of the passing of Act XVI. of 1868 which abolished the Courts of Sudder Ameens, an appeal was pending against the decree of the Sudder Ameen, which resulted in a modified decree afterwards executed by the Sudder Moonsiff. HELD that, although the appeal was pending in a superior Court, yet the proceedings in the suit were pending in the original Court of trial within the meaning of s. 12, and the Sudder Moonsiff's Court was the only Court which had jurisdiction to execute the decree.

Where the facts connected with an execution-sale fall far short of establishing fraud, and merely amount to irregularity resulting in detriment to the judgment-debtor, his remedy lies in an application under s. 256 of Act VIII. of 1859 to set aside the sale. Should such application fail, it is not open to him to resort to a regular suit on the same ground.

Phear, J.—THE principal facts of this case, as we understand it, are that the defendant No. 1 had obtained a decree for costs against the present plaintiff in a suit brought in the Sudder Ameen's Court. This decree was put in execution in the Court of the

Sudder Moonsiff of Mozuffurpore by the defendant No. 1, and the defendant No. 2 became the purchaser, at a sale held in that execution, of the property which is the subject of suit.

The present plaintiff, that is, the original judgment-debtor, brings the present suit against defendant No. 1, the original judgment-creditor, and defendant No. 2, the purchaser at the execution-sale, in order to set aside that sale, and to recover his property on the double ground of fraud and of want of jurisdiction in the Court which executed the decree to execute it. Want of jurisdiction is sought to be established in this way. After the decree was passed by the Sudder Ameen, the Judicial Divisions were altered under the provisions of the Bengal Civil Courts Act (XVI. of 1868), and Sudder Ameens were abolished. It also appears that, at the time when Act XVI. of 1868 was passed, an appeal was pending against the decree of the Sudder Ameen. That appeal was heard, and a modified decree was passed on the 29th of May 1868, after the date of the passing of the Act.

In due course, if this Act had never been passed, that decree would have gone back to the Sudder Ameen's Court for execution. But the effect of the Act was, as we have already said, to abolish Sudder Ameens' Courts, and it is, somewhat faintly perhaps, urged before us that there was no Court put in the place of the Sudder Ameen's Court for the purpose of executing the decree. Now the words of section 12 of the Act which bear on this point are these: "Every Court under this Act shall have the same jurisdiction over all proceedings pending in the Court for which it shall have been substituted, as the Principal Sudder Ameen, Sudder Ameen, or Moonsiff (as the case may be) of such Court would have had if this Act had not been passed: provided that every Moonsiff exercising jurisdiction under this Act within the local limits of a Sudder Moonsiff shall have jurisdiction over all proceedings pending in the Court of the Sudder Ameen immediately before the passing of this Act."

If the proceedings in this suit were pending at the time of the passing of the Act in the Court of the Sudder Ameen, then it would be very clear that the Court which would have jurisdiction after the passing of the Act to execute the decree would have been the Court of the Sudder Moonsiff. But it is said that, because an appeal was at that time pending in a superior Court, the proceedings were not pending in the Court of the Sudder Ameen within the meaning of this section.

That is the argument, as we understand it, which has been relied upon by the respondent before us; and no doubt, if that argument is valid, we are bound to give effect to it to the letter, and the consequence would be that this Act has destroyed the only Court which could execute the decree, and put no other in its place; and we suppose a like consequence must have happened in a good many other cases.

It seems to us that we ought certainly to pause before giving such a construction to the words of the section as would lead to such serious consequences as these. We do not, however, think that we are obliged to put such a narrow construction on these words as that which is contended for. It seems to us that, although it may be said that the appeal against the decision of the Sudder Ameen was pending in a superior Court, yet the proceedings in the suit were, within the meaning of the words used in this section, pending in the original Court of trial, and would be so until execution was taken out, and the decree finally satisfied. It is to that Court that the decree, after it is disposed of in the Appellate Court, must come back for execution, because, in truth, all the proceedings are there, and must be there practically carried out.

We must say that we have no real doubt that the words of section 12 of Act XVI. of 1868 were used by the Legislature with intention large enough to comprehend such a case as the present. Both the Courts below have taken the same view of the law with regard to this objection, and we think that they are right.

If this be so, execution was taken out by defendant No. 1 in the only Court which had jurisdiction to execute the decree, and the objection made by the respondent, that that Court could not make a valid sale, in my opinion, falls to the ground.

The second ground urged before us may be briefly stated thus:—

The plaintiff maintains that the execution-sale was brought about by fraud against him, and ought, therefore, in equity, to be held void, and set aside.

The Lower Appellate Court has come to the conclusion that the facts made out by the plaintiff do establish a case of substantive fraud on the part of all the defendants. But it appears to us that the facts, which the Lower Appellate Court has found specifically,

fall very far short of anything of the kind. At the utmost they amount to irregularity in the proceedings accompanied by a consequence in the shape of a sale of property for a sum considerably below its value, and the Judge somewhat vaguely appears to say that he is of opinion that defendant No. 1 intentionally caused these irregularities with a view to injuring him, the plaintiff. He stops short, however, of finding, as a fact, that the purchaser, defendant No. 2, had any complicity in this matter. It appears to us that the Judge was wrong in thinking that he could set aside the sale upon the state of things we have just mentioned. These facts amount to nothing more than the facts which will enable the Court, on an application made in proper time under the provisions of section 256, to set aside the sale which has been held in execution of decree.

Now we understand that an application was actually made in this case under section 256, in which the plaintiff sought to make out these very facts of irregularity, and consequent detriment to himself, and that this application failed. This being so, it seems to us that it was not open to the plaintiff to bring a regular suit for the purpose of establishing the same thing, in fact, to set aside the sale, and get back his property on no other ground than that which had been already determined between him and the defendants No. 1 and No. 2 in a proper tribunal. No doubt, it was open to the present plaintiff, if the facts were such as to justify him in taking the course, to bring a regular suit as he has done against the judgment-creditor defendant and the purchaser-defendant upon the ground that they had conspired together, and had employed the procedure and processes of Court for the purpose of, and in such a way as to defraud him, and upon that equity to have asked to have the sale set aside, although it was strictly a valid sale in law. But he has not done this. His suit is not framed for this purpose. It would have been necessary in such a suit to offer to refund to the purchasers the purchase-money, which they had paid in, with interest thereon.

Neither has the plaintiff, according to the view of facts taken by the Lower Appellate Court, made out anything which amounts to a fraud of this sort.

It appears to us, therefore, on the whole, that, on the facts which the Lower Appellate Court has found, the plaintiff has entirely failed to make out any right to have the sale set aside as against the present appellants, and, therefore, his suit ought to be dismissed. The decree of the Lower Appellate Court must accordingly be reversed with costs.

The 9th April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Ex-parte Decree—Execution-sale.

Case No. 848 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 22nd January 1872, affirming a decision of the Additional Moonsiff of that District, dated the 24th August 1871.

Baboo Gowree Boyjo Nath Pershad and another (Defendants), *Appellants,*

versus

Jodha Singh (Plaintiff), *Respondent.*

Baboo Mohesh Chunder Chowdhry and *Moonshee Mahomed Yusuf* for Appellants.

Mr. R. E. Twidale for Respondent.

A had sued R and others for possession of two mouzahs with mesne-profits, and obtained a joint decree against them in the absence of R. In execution, A was about to put up the rights and interests of R in mouzah Gorawan, when R applied for a re-trial under Act VIII of 1859, s. 119. The petition was rejected, and the property sold, the decree-holders becoming purchasers. R appealed, and the High Court remanded the case to the Judge, who, after investigation, set aside the *ex parte* decree, and revived the suit, holding after re-trial that R had no interest in the mouzahs in suit, and was not liable to the claim of A. The latter appealed, and the High Court decided that R had been in possession of mouzah Jugdeshpore, and was liable for the mesne-profits. R then brought a suit for possession of a share in the mouzah, which had been sold in execution:

HELD that the plaintiff could not, in justice, seek to recover this property from the defendants without offering to pay them the debt which he owes them, and which formed part of the consideration-money.

Phear, J.—THE Subordinate Judge states the principal facts of this case as follows:—

"The appellants had sued the respondent "and others for possession of mouzahs "Ousoon Jugdeshpore and Roopospore, with "mesne-profits amounting to Rs. 10,000 of "11,000, and obtained a joint decree against "them on the 18th November 1864 in the "absence of the respondent. In execution "of that decree, the appellants were about "to put up to sale the rights and interests "of the respondent in mouzah Gorawan, "when the latter presented a petition for

a re-trial of the suit by setting aside the *ex-parte* decree under section 119 of Act VIII. of 1859. The petition was rejected by the Judge, and the property brought to sale, and purchased by the appellants, decree-holders. The respondent having appealed, the High Court remanded the case, and the Judge, after investigation, being of opinion that the appellants failed to establish the service of the summons upon the respondent and issue of the notice of attachment, set aside the *ex-parte* decree, and revived the suit for a re-hearing. On the re-trial it was held by the Judge that the respondent had no interest in the mouzahs in suit, and was not liable to the claim of the appellants. The latter appealed, and the High Court, on the 2nd May 1867, decided that the respondent had been in possession of Mouzah Jugdeshpore, and was liable for the mesne-profits of the mouzah, which, according to the plaint of the appellants, amounted to, in round numbers, Rs. 2,000. The respondent then brought this suit in the Moonsiff's Court for possession of 1 anna 1 dam 13 cowries which he averred to be his share in mouzah Gorawan sold in execution of the *ex-parte* decree."

He sought to recover possession of this property on the ground that the sale in execution of decree was a void sale, inasmuch as the decree itself had been set aside under the provisions of section 119 of the Civil Procedure Code.

It is not very clear on the papers before us what was the date of the execution-sale, but it must have been some time in 1865, while the present suit to set aside the sale, which was effected in that execution, was brought on the 1st November 1870. This is obviously much more than 12 months after the date of the sale which is sought to be set aside; and the inclination of our opinion is that the suit is barred by reason of the enactment in the 3rd clause of the 1st section of Act XIV. of 1859. But it is not absolutely necessary that we should express our judicial opinion on this point, because we think the suit ought to fail upon another ground. There is nothing in the case to indicate that the purchasers, that is, the appellants, had effected this sale in fraud of the judgment-creditor, other than the fact that the summons and the service were not proved to have been duly effected. And it is certain now that the plaintiffs in the present suit are indebted to the defendants, that the appellants, to the extent of Rs. 2,000, and interest under the final decree in the former suit. This sum they have not offered to pay to the defendants, or in any way to take it into account. The plaintiff simply seeks to recover property which was sold in execution, and if he does so recover under the decisions which have been given in his favor, the result will be that the defendants who, on the facts, have come *bonâ fide* into possession of this property in consideration of the debt due from the plaintiff to them, will have to seek a new execution of the decree which they have obtained against the plaintiff in respect of that debt.

It seems to us quite manifest that they ought not, in equity, to be placed in such a situation as this. The plaintiff cannot in justice seek to recover this property from the defendants without offering to pay them the debt which he owes them, and which formed part of the consideration of their purchase.

Mr. Twidale, at the hearing of this appeal on behalf of his client, expressed his readiness to have the decree of the Court below modified to the extent of declaring the right on the part of the defendant to be paid this money as a condition precedent to the plaintiff's recovering his property. But we do not think we can rightly do this at the stage to which the suit has reached. An effective decree of that sort could only be arrived at by way of a remand to the first Court to take the accounts; in other words, a remand to the first Court to re-try the case on a new foundation.

It appears to us that the plaintiff is not entitled to recover on the ground on which he has chosen to bring his suit, and that we ought not, under the circumstances of the case, to go out of our way to help him.

On the whole, we are of opinion that the decree of the Lower Appellate Court should be reversed, and the plaintiff's suit dismissed with costs.

The 17th April 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Limitation—Interlocutory Proceedings.

Case No. 11 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 26th September 1872, affirming an order of the Subordinate Judge of that District, dated the 17th May 1872.

Romanauth Jha and another (Judgment-debtors), *Appellants*,

versus

Roy Luchmeeput Singh Bahadoor (Decree-holder), *Respondent*.

Baboo Taruck Nath Dutt for Appellants.

Baboos Sreenath Dass and *Gooroo Dass Banerjee* for Respondent.

A decree-holder having sold certain property in execution, and purchased it himself, a balance still remained due to him under the decree. Some time after a third party brought a suit to establish his right to the property, the decree-holder and judgment-debtor both being made parties.

HELD that it was right, and under the circumstances perfectly equitable, to count the time spent by the decree-holder in that litigation as spent in *bonâ fide* carrying on execution.

Glover, J.—THE point in this special appeal is whether the decree-holder's application to execute is barred by limitation or not. The decree was passed on the 21st of August 1863 for Rs. 1,381. Execution was taken out, and property attached under it, which property was sold on the 22nd of July 1861. The decree-holder bought this himself, and after that purchase there still remained a balance due to him under the decree of Rs. 561. Some time, or about a year, after, Karoo Lall brought a suit in the Civil Court to establish his right to this property, and to that suit the decree-holder and the judgment-debtor were both made parties. The decree-holder defended the suit, very naturally wishing to retain the property which he had purchased. Karoo Lall, however, eventually succeeded in appeal to the High Court on the 25th of November 1869. The question is whether the time passed in that litigation is to count in the decree-holder's favor as time spent in *bonâ fide* carrying on the execution of the decree. The Courts below have found that it ought so to count.

It appears to us that these decisions were right, and in any case, under these circumstances, they were perfectly equitable. The decree-holder in defending the suit did, no doubt, all that he possibly could to get the benefit of the sale under the decree, and to further the proceedings taken in execution; if he had not made his appearance, or not defended the suit, the result would have been that the whole of the benefit which he derived from the sale in execution would have been lost to him, and in defending it he did all he could to uphold the sale.

Three cases* have been quoted to us to be found in volumes IV., VI., and XVI. of the Weekly Reporter, which lay down substantially the same principle, namely, that whatever litigation is undertaken in furtherance of a decree, or proceeding in execution of a decree, is to be allowed in favor of the decree-holder in counting time to be allowed for execution of the decree.

Another objection taken is that, under any possible circumstances, the decree-holder could not recover the money for which this property was sold in execution, inasmuch as the Full Bench decision laid down that no such money can be recovered unless it can be proved that there was any irregularity in conducting the sale which is not alleged in this case. This objection was not taken in the grounds of special appeal, and we think that we are right in declining to allow it to be taken now. The decree-holder acted honestly throughout the proceedings, he made no unnecessary delays, and he did all that he possibly could to uphold the sale and further the execution of the decree; and the fact that he has so long been kept out of his money is due to circumstances over which he could have no possible control.

Then again it is said that, as regards the balance of Rs. 561, which remained due after the sale, that portion of the decree under any circumstances is barred, inasmuch as the decree-holder could have taken out execution for that amount at any time and that he was not bound to wait for the result of the litigation in Karoo Lall's case. This is not so; the decree-holder could not take out execution in respect of these Rs. 561 until that suit was disposed of, as he could not say what might eventually be the sum for which he would have to sue out execution. If he succeeded in upholding the sale, then of course Rs. 561 would be the balance due to him, and if he failed, he would have to recover the original amount of Rs. 1,381 due under the decree; and moreover it is impossible to say that a decree can be divided in this way, and that one part of it can be said to be alive, while another

* Shureefoonisa *vs.* Raj Kissen, 4 W. R., Mis. R., 8; Maharanee Indurjeet Koonwar *vs.* Mazum Ali Khan, 6 W. R., Mis. R., 76.
Shibchunder Dass *vs.* Ram Chunder Poddar, 16 W. R. 29.

art of the same decree is to be treated as lead.

On the whole of the circumstances, we ink that the Judge below was right in his ecision, and we therefore affirm it with osts.

The 17th April 1873.

Present:

he Hon'ble W. Markby and E. G. Birch, *Judges.*

Hindoo Widow—Adoption—Reversionary Heirs—Declaratory Decree.

Case No. 154 of 1872.

egular Appeal from a decision passed by the Judge of Midnapore, dated the 4th April 1872.

Ranee Brohmo Moyee (Defendant), *Appellant,*

versus

Rajah Anund Lall Roy (Plaintiff), *Respondent.*

. J. T. Woodroffe and *Baboos Bhowanee Churn Dutt, Mohinee Mohun Roy,* and *Kedar Nath Sircar* for Appellant.

Advocate-General and *Baboos Hem Chunder Banerjee* and *Bama Churn Banerjee* for Respondent.

he N L, having no sons, and falling out with his her, adopted the son of his dewan, and dying left as urvivors his wife and Gujendro, the adopted son. equently G died, and the widow adopted another O, who is still a minor. The present suit is brought N L's brother A L against the widow and minor for the purpose of having the adoption declared alid, and to have his reversionary right declared. eference being had to the uncertainty of the law in ect of the right of the presumptive next taker after indoo widow to a decree simply declaring her adop- invalid, and to a recent ruling of the Privy Council, it is discretionary with the Court to grant or e a declaratory decree, and to its being doubtful as hether such decree would be binding upon the ons who might eventually succeed on the death of widow, as well as to the unsatisfactory nature of the ence for the plaintiff, the Court thought it the safest rse to refuse to make the declaration.

Markby, J.—In this case it appears that e Rajah Nund Lall, having no sons of his n, at one time intended to adopt, and took me steps towards adopting, his brother's andson Opendro Lall, but afterwards, arrelling with his brother, adopted another ild, the son of his dewan, Gujendro Lall. ajah Nund Lall died, leaving him surviving his wife, the defendant Brohmo Moyee, and his adopted son, Gujendro. Gujendro has since also died, and the defendant Brohmo Moyee has thereupon adopted another son, Opendro Chunder, who is a defendant in this suit, by the name of Opendro Lall Roy. Opendro Chunder is still a minor, and his mother has assumed to act as his guardian in this suit, but whether she has obtained the certificate necessary for that purpose under Act XL. of 1858 does not appear.

The present suit was brought by Anund Lall, the brother of Nund Lall, originally against Brohmo Moyee alone, but afterwards the minor was added. Anund Lall alleged himself to be the reversionary heir of his brother Nund Lall; that the adoption of Opendro Chunder was made without authority; and he asks to have this adoption declared invalid, and to have his reversionary right established in the property described in the schedule. Subsequently he put in a petition stating that he only desired to have the adoption set aside, and his reversionary right declared, but did not wish any inquiry as to what the property was to which that right attached.

It is admitted that, in the present state of this family, if the adoption be got rid of, the present right of possession is in Brohmo Moyee as heiress of her son Gujendro Lall, in whom the property had vested absolutely, and that, after her death, the plaintiff Anund Lall, if then alive, would take the property. But the estate is now wholly vested, either in Brohmo Moyee, or in Opendro Chunder, according as the adoption is, or is not, invalid; and if the adoption be invalid, the plaintiff's right of succession is still contingent upon his surviving Brohmo Moyee.

That the plaintiff cannot maintain this suit, so far as it seeks to have what he calls his reversionary right declared, is clear. If he means by that to have it declared that he is the person who would take at this moment if both Opendro Chunder and the widow were out of the way, nobody disputes it. If what he means is to have it declared that he is the person who will ultimately take the property after the death of the widow, no such declaration can be made, for that cannot yet be known; and should the plaintiff die before Brohmo Moyee, the person who will then take, if the present adoption be void, will be, not the heir of the plaintiff, but the heir of Gujendro, whoever that may be.

The first question, therefore, is whether the presumptive next taker after a Hindoo

widow can sue to set aside her invalid adoption.

That the presumptive next taker may sue to restrain the widow from committing waste may be considered to have been recognized by this Court. It may also be that should the widow exceed her powers of alienation, a suit may be brought to declare the alienation void, except as against the widow herself. I think the expression attributed to me in the case reported, 5 B. L. R., page 518, is rather too strong that the law is so "settled." For, as I there point out, there are opinions directly the other way; and I find that, in another case, to which I do not there refer, whilst there are some expressions which favor the maintenance of the suit, there are certainly other expressions which lead to the opposite conclusion (see the Full Bench case reported in 9 Weekly Reporter 505).

But, even supposing it to be the law that a presumptive next taker after a Hindoo widow may sue in the widow's lifetime, not only to prevent waste by her, but also to declare her alienations void except as against herself, still it does not follow as a necessary inference that he may sue to declare her adoption invalid. By alienation the possession and control of the property pass at once out of the hands of the widow to a stranger. The result of adoption may be in some cases to take the possession and control of the property out of the hands of the widow, and put it into the hands of another person. At present, however, this has not happened in the case before us. The widow, as guardian of her infant adopted son, remains in possession as before. The case which we have been referred to as that in which this question was settled, is that reported in 9 Weekly Reporter 464. But I do not think that the observations of Sir Barnes Peacock and Sir Charles Hobhouse in that case amount to more than an expression of inclination of an opinion. I do not think it is likely that the question, whether this suit can be maintained, can be settled without determining another question referred to in that same case, namely, whether a decision in it would be binding on the next taker after the death of the widow, whoever that next taker might be; or, as Sir Barnes Peacock puts it: "Whether the "decree would be binding upon the persons "who might eventually succeed upon the "death of the widow in the same manner as a "decree against the widow is binding upon the "reversionary heirs." But that question has never yet been finally determined. On the other hand, I think it is impossible to read the observations of the Privy Council in the case reported, 19 Weekly Reporter 133, without seeing that that Court had not then formed any decided opinion as to the right of the presumptive next taker to a decree simply declaring the adoption invalid.

Even, therefore, if upon the evidence the case were clear for declaring the adoption invalid, I should desire further consideration before holding that the suit would lie. This point, however, was not fully argued, and being one of very considerable difficulty and importance, I do not wish to be considered as having now expressed any opinion upon it. I merely refer to the state of the law as one of the grounds for the conclusion at which I ultimately arrive.

One thing seems quite clear, that it is wholly discretionary to make, or to decline to make, the desired declaration. The Privy Council say in a recent case (19 Weekly Reporter, page 139): "It is not a matter of "absolute right to obtain a declaratory "decree; it is discretionary with the Court "to grant it or not, and in every case the "Court must exercise a sound judgment as "to whether it is reasonable or not under all "the circumstances of the case to grant the "relief prayed for." I think there is a misprint here. The context requires that the last words of the sentence should be "declaration," not the "relief," prayed for. The judgment then proceeds: "There is "much more danger in India than here of "harassing and vexatious litigation that the "Courts in India ought to be most careful "that mere declaratory suits be not converted "into a new and mischievous source of "litigation."

Now, having regard to the only ground upon which the right to maintain a suit of this kind has ever been placed—I mean the danger that evidence might be lost—it seems to me that we ought not to make a declaration unless we see at least some clear ground to go upon. If the rights of the parties must ultimately be settled upon evidence which is satisfactory, that may be well done after Brohmo Moyee's death, now, when a decision can be given which will be undoubtedly final. Whereas, it is doubtful whether a decision given by us would effectually determine any question whatever.

Now, let us see the grounds upon which we are asked to declare this adoption invalid. The parol evidence in support of the deed is direct upon the point, being that of witnesses who say they were present at the execution

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t against the deed is also direct, as rds the evidence of the witness oy Mirto. As to the others it is only rect. Probably the witnesses on both s are strong partizans.

o doubt we ought to attach great value the opinion of the District Judge upon evidence which was given in his presence; no doubt his opinion is in favor of the tiff. But he does not say anything decisive upon this, and I think he bases opinion rather upon some external conrations which I will review.

the first place he says that the witnesses not of the class one would expect Rajah to have summoned on such an asion, and that he would rather have d in his principal relations. But we that he had quarrelled with his nearest ions, and I think the evidence shows neither the plaintiff nor Soroop Narain d the Rajah during his last illness. over, the act, which the Rajah was to perform, was in direct opposition to wishes and interests of his own relations, none of his relations appear to have essed a deed of gift executed in the year, and which is admitted to be ine.

he District Judge thinks this deed of which the defendants relied on, rather against their case. The deed of gift (according to our translation): "I have opted (not 'you have adopted,' as in my py of the Judge's decision) a son with ur consent; should it be necessary in ure to adopt a son, I will execute an oomotee-puttro to that effect hereafter." e District Judge thinks that indicates an ation only to execute an onoomotee-puttro case Gujendro Lall died in the Rajah's life-e. But I should have thought that in case the Rajah would adopt another son self, and that the power *to adopt* would given to the widow to meet any contin-ey that might arise after the Rajah's th.

The District Judge points out that there clause in the deed which directs that it ld be registered, and that notice should given to the Courts, but that non-regis-ion is not to affect its validity. It does t appear to me that this very strongly dicates that the document is a forgery. is at least is certain, that there was never attempt or intention to conceal the docu-nt, for it was produced within a few days er the Rajah's death.

The District Judge also makes a comparison between the signatures to this deed and those to the deed of gift which he found to be genuine. It is a comparison which I should hardly venture to make, but I agree with the District Judge in thinking that it is an unsafe guide; and especially so, when only two signatures have been compared. It is not at all likely that such persons as are interested in this case would, in committing a forgery, produce signatures which, at a glance, could be detected as false.

Moreover, the District Judge hardly gives sufficient weight to the delay which has taken place. He says that this deed is principally a deed of guardianship for the boy. I am inclined to think it is a great deal more. I am inclined to think that it is a will in Gujendro Lall's favor. The Rajah says (according to the Hindoo form addressing his wife): "Deducting what I formerly made "a gift of to you, I appoint you executrix "and manager under this deed in respect of "the remaining zemindaries, talooks, and "all the rights appertaining thereto, the "malikana, &c., leaving as heir my own "adopted son, Jogendro Lall Roy, *alias* "Gujendro Lall Roy, whom I have been "maintaining." This would seem to amount to a devise. (See the judgment of Sir Barnes Peacock and Mr. Justice Shumboonath Pundit in the case reported, 1 Ind. Jur., N. S., page 24.) It also gives to his widow an absolute power to dispose of some portion of the property which he had previously given to her; and upon the question of guardianship, the deed under section 7 of Act XL. of 1858 would be conclusive.

Now, ever since the death of the Rajah, there has been a desperate litigation going on between the widow and the present plaintiff, at every stage of which this document has been produced. The main subjects of dispute in this litigation have been the validity of the adoption of Gujendro Lall, against whom were set up the rival claims of Opendro Lall, and the right to the intermediate custody of the property. Upon both these questions this document would have an important bearing. It is certainly to my mind a circumstance which requires explanation that, although this document has been produced and filed on three several occasions, and on one occasion at any rate, if not on all, formally proved, its genuineness has not been hitherto challenged.

I do not think it necessary to say more to show how very little external circumstances at present seem to strengthen the case of the plaintiff.

Under all these circumstances, I think the safest course to pursue is to refuse to make the declaration which the plaintiff asks for, namely, that the adoption is invalid. Upon the construction of the deed I express no opinion.

Of course, however useful this inquiry may be on any future occasion (and I think even in the result which we have come to, it may be of use), the decision itself is not in any way conclusive.

I think that the decree of the Court below should be set aside, and that the suit should be dismissed with costs in both Courts.

Birch, J.—I concur with my learned colleague in thinking that, under the circumstances of this case, we should refuse to grant the declaratory decree prayed for.

The 4th April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Ejectment—Mortgage-bond—Redemption.

Case No. 738 of 1872.

Special Appeal from a decision passed by the Judge of Gya, dated the 30th December 1871, affirming a decision of the Subordinate Judge of that District, dated the 29th April 1871.

Baboo Ramessur Pershad Narain Singh (Defendant), *Appellant,*

versus

Doolee Chand and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboo Nil Madhub Sen for Respondents.

In 1848 B L obtained a decree against R C and R L, and in 1863, at a sale in execution of that decree, plaintiff's ancestor purchased the property now in dispute, and took possession.

In 1861 one K R sued the representatives of R C on a mortgage-bond under which a sum of money was alleged to have been secured upon the said property, and obtained a decree against the defendants personally, which did not direct sale of the mortgaged property. (Plaintiff's ancestor bought the property with the knowledge of the mortgage.) K R, in 1868, in execution, sold the right, title, and interest of her judgment-debtors in the property to defendants, who paid Rs. 5,000 as consideration-money, and obtained possession. Plaintiffs seek to eject defendants on the ground that the latter obtained no title to the property by their purchase;

HELD that, so far as defendant's money had gone to pay off the charge which K R had on the land, to that extent were they entitled to stand in her shoes as an incumbrancer; and that the suit, as far as regards the land covered by the mortgage-bond, must be taken to be a redemption-suit, and the plaintiff ought not to be allowed to recover the property without paying defendants so much as, on a proper taking of accounts, may appear to be due to them.

Phear, J.—So far back as March 1848, one Bhekun Lall obtained a decree against Ruttun Chand and Rughoobur, and, in October 1863, at the sale held in execution of that decree, the present plaintiff's ancestor purchased, amongst other things, the property which is now the subject of dispute, and obtained possession of it.

In the previous year, namely, in 1861, one Mussamut Koondun Kooer brought a suit against the representatives of Ruttun Chand on a mortgage-bond (under which bond a sum of upwards of Rs. 1,500 was alleged to have been originally secured upon the property in dispute) seeking to recover the amount then due under the bond; and she obtained a decree against the defendants personally for the sum of Rs. 3,000 and upwards. But it is to be observed that the decree did not direct realization of the money by the sale of the mortgaged property. We will also add that the ancestor of the present plaintiff, at his purchase in October 1863, admittedly bought the property with the knowledge of the mortgage, and subject to it.

Mussamut Koondun having obtained the decree for money in 1862, afterwards, in execution thereof, namely, in April 1868, sold the right, title, and interest of her judgment-debtors in the property which is now the subject of dispute to the present defendants. The defendants paid the sum of Rs. 5,000 as consideration money for their purchase, and obtained quiet possession of the property, as we understand, and Mussamut Koondun Kooer's debt was paid off out of the Rs. 5,000.

Up to that time the present plaintiffs have, it seems, been in possession since the date of their purchase in 1863, and they now turn round on the present defendants, and seek to eject them on the ground that they obtained no title to the property by the execution-sale at which they bought in 1868.

It is not alleged we believe now, nor was it in either of the lower Courts, that the present defendant is anything other than an honest purchaser, a stranger to the original parties, and it is not questioned that his money has gone to pay off the mortgage-debt. But the plaintiffs urge that inasmuch as Mussamut

oondun Kooer's decree did not affect the nd itself, and inasmuch as they, the plaint-s, had purchased the rights and interests Mussamut Koondun Kooer's judgment-ebtors in the property now in dispute arly five years before the execution-sale in 868, there was consequently at that time right or interest in this property remain-g in the judgment-debtors which could ass to the defendants by that sale; and ppears to us that this contention is just.

The Courts below have come to the like nclusion, and on this ground alone have ven the plaintiffs a decree for possession of e land. But it appears to us that there other considerations arising on the facts this case to affect the equities between the ties.

It seems to us that, under the circumstances ch we have mentioned, so far as the endants' money has gone to pay off the rge which Koondun Kooer had upon the , to that extent the defendants are tled to stand in her shoes as an incum-ncer.

This case, as it seems to us, altogether rs in regard to the equities between the ies from that class of cases to which we been referred during the course of the ment, and in which the judgment-credi-himself was purchaser at the execution-which he had caused to be made.

It is beyond question that, up to the date the ineffective execution-sale of 1868 place, the plaintiff held the property in dispute subject to the charge in r of Mussamut Koondun Kooer. She d release the property from the charge if chose, and so might any third person chose to pay her debt with the intention exonerating the property. And if either ese events occurred, it would amount to ft to the plaintiff, which the plaintiff d not claim of right. He could not him-get rid of the burden, except by paying debt to which the property was subject he bought it. How then can he have equitable right as against the defendant ve this debt paid off with the defendant's ey against his will? The defendant never any intention to exonerate the property for plaintiff's benefit, or give him any right aim that it should be exonerated. The tiff has clearly no right, as it seems to to be either any better or any worse off he was before this transaction of sale, the defendant has simply, as regards him, the place of Mussamut Koondun er.

If then the defendants are entitled to stand in Mussamut Koondun Kooer's shoes, it follows that had they been out of possession now, instead of in possession, they would have had a right to bring a suit against the present plaintiffs for the purpose of enforcing their mortgage-lien. As it happens, the suit has been brought by the present plaintiffs against them, and the position of parties is reversed. The circumstances, however, as we have already said, are not such as ought to lead us to attribute any wrong-doing to the defendants when they succeeded in getting possession of the property on the footing of the execution-sale in April 1868; and it seems to us that, as both parties are now before this Court, there is no substantial reason why their equities should not be ascertained, and justice done between them in the present suit instead of first turning the defendants out, and then remitting them to a second suit for the same purpose.

We think we must take the present suit as being, so far as concerns the land which is covered by the mortgage-bond, a redemption-suit brought by the present plaintiffs. We think that they ought not to be allowed to recover that portion of the property without paying the defendants so much as, on a proper taking of accounts, may appear to be due to him.

In taking these accounts, not only must it be ascertained what is at the present time due upon the footing of the mortgage on the one side, but it must also be ascertained what has been received by the defendant in the shape of mesne-profits on the other side, and that ought to be taken as having been received by way of interest.

We think therefore that the decree of the lower Court must be varied in this respect. The plaintiffs will recover possession of the property to which they have made out a title (the particular form of the decree will be settled hereafter), but as regards so much of that property as is covered by the mortgage-bond, the decree for possession must be made conditional upon the payment by the plaintiffs to the defendant of the balance which will appear to be due to him on taking the accounts just mentioned.

The case will be remanded to the Lower Appellate Court for the purpose of taking the accounts.

The 18th April 1873.

Present :

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Usufructuary Mortgage—Dispossession—Profits—Mesne-profits.

Case No. 881 of 1872.

Special Appeal from a decision passed by the Judge of Gya, dated the 23rd January 1872, reversing a decision of the Subordinate Judge of that District, dated the 20th July 1871.

Kherodhur Lall (Defendant), *Appellant,*

versus

Doolee Chund (Plaintiff), *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Nil Madhub Sen for Respondent.

Plaintiff for a consideration obtained from defendant a *zur-i-peshgee* lease, which contained an undertaking that, in the event of plaintiff's possession being interfered with by defendant or defendant's previous ticcadar, defendant would pay back to plaintiff his money with interest and profits. The Lower Appellate Court, finding that plaintiff, after enjoyment for three years, had been turned out of possession by the previous ticcadar, gave plaintiff a decree for the original money advanced with interest and mesne-profits for the unexpired portion of the lease :

HELD that mesne-profits should not have been awarded.

Phear, J.—THE material facts of this case, as I understand them, are as follow :—

The plaintiff obtained from the defendant in 1272 a zur-i-peshgee lease of the property, which is named in the suit, in consideration of money advanced to the defendant. In that lease there was a covenant or undertaking on the part of the defendant of a somewhat unusual character; it was an undertaking that, in the event of the plaintiff's possession being interfered with by either the defendant or by one Wazir Singh, who had been the previous ticcadar of the defendant, the defendant would pay back to the plaintiff his money with interest and profits.

I have stated the tenor of this covenant or undertaking generally. But I must mention that there are two words or terms in it which admit of some doubt as to the proper construction to be placed upon them, namely, the word "dakhalkari," which was used to designate possession or the giving of possession, and also the word which has been used in respect of the profits.

The first Court was of opinion that the plaintiff had in fact obtained possession from the defendant under this lease, and had enjoyed the property accordingly for some time, and was also of opinion that the covenant of the defendant only extended to the securing to the plaintiff quiet possession in the first instance; that it did not extend to the maintaining him in possession afterwards against the acts of Wazir Singh; and on that ground the first Court dismissed the plaintiff's suit.

The Lower Appellate Court took a different view of the word "dakhalkari," and was of opinion that the undertaking with regard to possession which I have mentioned that the defendant entered into amounted to an undertaking to keep the plaintiff in quiet possession of the premises during the whole period of the lease, as well as to giving him actual possession at the outset. In this view the Lower Appellate Court finding that the plaintiff, after he had been in enjoyment of the property for three years, had been turned out of possession by Wazir Singh, held that the defendant was liable upon this covenant and accordingly gave the plaintiff a decree for the original money advanced with interest thereon at the stipulated rate per cent., and with mesne-profits for the period of the lease which remained unexpired at the time when the plaintiff was turned out of possession.

If we are called upon now to consider the question as to the accurate meaning of the expression "dakhalkari," I should require certainly more time and also the assistance of a sworn interpreter of the Court before I could give a judicial decision. But it appears to me that, on the facts found by both the lower Courts, the plaintiff has not only lost the security for the money which he advanced to the defendant, but that the subject which the defendant gave to him as security has gone back into the hands of the defendant himself and has been given over by him on some terms that we know nothing about to the man Wazir Singh. If this is so, it is to me perfectly plain that the plaintiff is entitled to say to the defendant: You have got back the land which you gave me as a security for my money and the interest, you must at any rate re-pay me that money and interest. As to the extent to which the Lower Appellate Court has gone in this direction, I think we ought not to interfere with its decision on special appeal. I am more than doubtful however, whether the judgment of the Lower Appellate Court has not gone considerably in excess of this. The Judge has decreed the

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ondun Kooer's decree did not affect the d itself, and inasmuch as they, the plaint- had purchased the rights and interests Mussamut Koondun Kooer's judgment- tors in the property now in dispute rly five years before the execution-sale in 8, there was consequently at that time right or interest in this property remain- in the judgment-debtors which could s to the defendants by that sale; and ppears to us that this contention is just.

The Courts below have come to the like clusion, and on this ground alone have en the plaintiffs a decree for possession of land. But it appears to us that there other considerations arising on the facts this case to affect the equities between the ties.

seems to us that, under the circumstances ch we have mentioned, so far as the ndants' money has gone to pay off the ge which Koondun Kooer had upon the to that extent the defendants are ed to stand in her shoes as an incum- cer.

his case, as it seems to us, altogether rs in regard to the equities between the es from that class of cases to which we been referred during the course of the ment, and in which the judgment-credi- himself was purchaser at the execution- which he had caused to be made.

is beyond question that, up to the date the ineffective execution-sale of 1868 place, the plaintiff held the property in dispute subject to the charge in ar of Mussamut Koondun Kooer. She d release the property from the charge if chose, and so might any third person chose to pay her debt with the intention exonerating the property. And if either ese events occurred, it would amount to ift to the plaintiff, which the plaintiff d not claim of right. He could not him- get rid of the burden, except by paying debt to which the property was subject n he bought it. How then can he have equitable right as against the defendant ave this debt paid off with the defendant's ney against his will? The defendant never any intention to exonerate the property for plaintiff's benefit, or give him any right laim that it should be exonerated. The tiff has clearly no right, as it seems to to be either any better or any worse off he was before this transaction of sale, the defendant has simply, as regards him, n the place of Mussamut Koondun oer.

If then the defendants are entitled to stand in Mussamut Koondun Kooer's shoes, it follows that had they been out of possession now, instead of in possession, they would have had a right to bring a suit against the present plaintiffs for the purpose of enforcing their mortgage-lien. As it happens, the suit has been brought by the present plaintiffs against them, and the position of parties is reversed. The circumstances, however, as we have already said, are not such as ought to lead us to attribute any wrong-doing to the defendants when they succeeded in getting possession of the property on the footing of the execution-sale in April 1868; and it seems to us that, as both parties are now before this Court, there is no substantial reason why their equities should not be ascertained, and justice done between them in the present suit instead of first turning the defendants out, and then remitting them to a second suit for the same purpose.

We think we must take the present suit as being, so far as concerns the land which is covered by the mortgage-bond, a redemption-suit brought by the present plaintiffs. We think that they ought not to be allowed to recover that portion of the property without paying the defendants so much as, on a proper taking of accounts, may appear to be due to him.

In taking these accounts, not only must it be ascertained what is at the present time due upon the footing of the mortgage on the one side, but it must also be ascertained what has been received by the defendant in the shape of mesne-profits on the other side, and that ought to be taken as having been received by way of interest.

We think therefore that the decree of the lower Court must be varied in this respect. The plaintiffs will recover possession of the property to which they have made out a title (the particular form of the decree will be settled hereafter), but as regards so much of that property as is covered by the mortgage-bond, the decree for possession must be made conditional upon the payment by the plaintiffs to the defendant of the balance which will appear to be due to him on taking the accounts just mentioned.

The case will be remanded to the Lower Appellate Court for the purpose of taking the accounts.

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soon as an objection was raised against that document in a previous suit for damages, a compromise was effected between the defendant's predecessor and the predecessor of the plaintiff. We do not find any proof of such compromise on the record of this case. But it is unnecessary for us to make any further remarks upon that question, inasmuch as the validity of the deed of 1246 must essentially depend upon the mode in which the property in suit has been dealt with by the parties.

If the plaintiff can prove the possession of his predecessor in title, as well as his own possession, down to 1263, the deed of 1246 must necessarily fall to the ground. If, on the other hand, the plaintiff fails to prove such possession, his suit must be dismissed on the ground of limitation.

The costs of this appeal and of the Lower Appellate Court must abide the ultimate result.

The 18th April 1873.

Present:

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges.*

Opening a Pathway—Criminal Court—Jurisdiction.

Case No. 1061 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 19th April 1872, affirming a decision of the Moonsiff of Kotulpore, dated the 6th June 1871.

Gooroo Pershad Roy and others (Plaintiffs), *Appellants,*

versus

Probhoo Ram Chuttopadhya and others (Defendants), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Respondents.

Plaintiffs sue alleging that, when they commenced to re-build a dilapidated wall which stood on the disputed ground with a doorway through it, defendant No. 1 brought a complaint of wrongful restraint against them; that the Deputy Magistrate, without inquiring into the charge, made an order with the consent of the complainant in that case directing him to open a path. Plaintiffs' suit is to have the pathway closed. The first Court held that it had no jurisdiction to entertain the suit. The Lower Appellate Court concurred with the Moonsiff in dismissing the suit:

HELD that, as there was nothing to show that the road was a public thoroughfare, or that the order passed by the Deputy Magistrate was passed under s. 308 Criminal Procedure Code, the lower Courts were wrong in refusing to entertain the suit.

Mitter, J.—IN this case it is clear that the lower Courts were wrong in refusing to entertain the suit. There was no order passed by the Deputy Magistrate under the provisions of the 308th section of the Code of Criminal Procedure. It appears that the defendant in this suit brought a complaint against a third person under section 341 of the Indian Penal Code, which relates to the offence of wrongful restraint. The Deputy Magistrate, without inquiring into the charge, made an order with the consent of the defendant in that case, directing him to open a road three cubits wide. There was nothing whatever to show that that road was a public thoroughfare, or that the order passed by the Deputy Magistrate was passed under the provisions of section 308. The rulings referred to by the lower Courts do not therefore apply to the present case.

The case is accordingly remanded to the Court of first instance for trial on the merits.

The 19th April 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Widow—Legal Necessity—Shradh Pilgrimage.

Cases Nos. 958 to 960 of 1872.

Special Appeals from a decision passed by the Subordinate Judge of Sylhet, dated the 1st April 1872, affirming a decision of the Moonsiff of Russoolpore, dated the 23rd January 1871.

Mahomed Ashruf (Defendant), *Appellant,*

versus

Brijessuree Dassee and others (Plaintiffs), *Respondents.*

Baboos Sreenath Dass and *Grish Chunder Ghose* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

A Hindoo widow may fairly and properly alienate a moderate portion of her deceased husband's estate for the purpose of making a pilgrimage to Gya to perform his shradh there, but she would not be justified in disposing of the entire property for that object.

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Glover, J.—THESE are cognate appeals. e plaintiff is a purchaser from the reverary heir one Muddun Mohun, and in capacity sues to recover possession of e small plots of land belonging to dun Mohun's estate, the widow having d.

he defendant claims by purchase from an inal purchaser from the widow Huree , and alleges that the latter sold the land purposes which the Hindoo law allowed, payment of her husband's debts, perance of his shradh at Gya, and marriage daughter.

he Moonsiff held that there was no proof y necessity to sell, and no proof that the was sold, either for Muddun Mohun's , or for his daughter's marriage. He ed to allow the performance of the Gya h to be a necessity justifying a sale.

e Subordinate Judge upheld the order first Court.

e point taken before us in special l is that the Subordinate Judge did not nto consideration the question whether t the widow went to Gya to perform husband's shradh, and whether there was ficient necessity according to Hindoo or her selling property to enable her to . The appellant also objected that the rdinate Judge had given no opinion as e "necessity" of the Gya shradh.

do not, I confess, see much probability e special appellant gaining anything by and, but, at the same time, I think he a right to ask it. The Subordinate e has decided that there was no proof of dun Mohun's having left debts, nor that marriage-expenses of his daughter red the sacrifice of his landed property; he has not found on the other alleged ssity, *viz.*, the Gya shradh.

ow, according to Hindoo ideas, the pernance of a deceased husband's shradh at would be a very proper and reasonable ssity, inasmuch as the soul of the sed is supposed to be greatly benefited by.

ch a pilgrimage would undoubtedly be ligious purpose supposed to conduce to spiritual welfare of her husband which ld give a widow a larger power of disposi- than she would ordinarily have [Color of Masulipatam *vs.* Caraly Venkata inapa, 2 Weekly Reporter (P. C.) 64]. I do not understand that the shradh pilge to Gya can be put any higher than ry necessary and meritorious performe. A widow ought, perhaps, to perform it, but she is not absolutely bound to do so. It is, I should say, one of those ceremonies, for the due performance of which a widow might fairly and properly alienate a moderate portion of her late husband's estate, but that she would not be justified in disposing of the entire property for that object. (Vyavasta Darpana 63, Volume I.)

The Subordinate Judge must decide therefore on the evidence whether the defendant has proved that there was any necessity for selling these three plots of land for the purpose of providing funds for the Gya shradh, which would no doubt involve the question whether Muddun Mohun left other property from the income of which the pilgrimage in question might have been performed without selling the landed estate. My own impression, after reading the Subordinate Judge's judgment, is that he found that there was such an income, but the wording is not, I admit, very clear.

It has been said that the defendant will have great difficulty at this distance of time in proving what is necessary. No doubt he will have great difficulty, and, so far as I have seen the evidence, I doubt whether any decision on the point could be come to. But the defendant is himself to blame; it is clear from his written statement that he knew what he had to prove; and if his witnesses do not, in the opinion of the Subordinate Judge, prove it, he cannot complain if the judgment is against him.

All purchasers from a Hindoo widow know or ought to know by this time the extreme risk of such a transaction, and if they choose to run it, and to buy without consulting the next heirs, or without taking such further steps as would enable them at some future time, should necessity arise, to prove that they made diligent and careful inquiry as to the existence of a legal necessity before buying, they must take the consequences. The defendant here is rather in a worse position, as he is a purchaser from the original buyer. However, if he considers that there is sufficient evidence on the record to enable the Subordinate Judge to decide that there was no income from Muddun Mohun's estate, and that the only way for the widow to perform the Gya shradh was to sell the land, he is entitled to ask for a remand for the purpose of supplying the omission.

If the Subordinate Judge considers that in respect of any of the three plots there is evidence sufficient, he will dismiss the plaintiff's claim so far, it being, I consider, a reasonable necessity according to Hindoo law

that a widow should perform her husband's Gya shradh if circumstances render it practicable, and that she may, for this purpose, alienate at least a portion of his estate.

Costs will follow the result.

Kemp, J.—I concur.

The 21st April 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Omission of parties—Fraud.

Case No. 2 of 1873.

Application for review of judgment passed by the Hon'ble Justices F. B. Kemp and F. A. Glover, on the 12th December 1872, in Regular Appeal No. 45 of 1872.

Brojo Gobind Doss, Plaintiff (Respondent), *Petitioner,*

versus

Chand Ram Doss, Defendant (Appellant), *Opposite Party.*

Mr. J. T. Woodroffe and *Baboos Ashootosh Dhur* and *Kumlakant Sen* for Petitioner.

Mr. M. L. Sandel and *Baboo Joy Gobind Shome* for Opposite Party.

Though, under ordinary circumstances, a Court of Equity would not throw out a suit, merely because a necessary party had not been made a defendant, but would supply the omission, yet in this case the Court dismissed the suit, holding that plaintiff had intentionally omitted a party, and concealed facts relating to defendant, and had unfairly endeavoured to saddle defendant with the entire responsibility of the claim.

Glover, J.—The judgment of which a review is now sought proceeded on one ground only, *viz.*, that Raj Coomar not having been made a party to the suit, the plaintiff's case ought to have been dismissed. There were certain observations made regarding the way in which the Subordinate Judge had treated the evidence, but the decision of this Court was on the ground above stated, and on this point only ought we to consider the present application for review.

It has been argued for the petitioner that, if we consider it necessary for Raj Coomar to be made a defendant in the cause, we ought to have remanded the case with directions to have it re-tried in his presence, and that at any rate leave ought to have been given to the plaintiff to bring a fresh suit.

The questions, whether we were correct in our reading of the plaint, and whether the plaintiff did or did not admit the correctness of the accounts, and what were the accounts referred to, need not be considered, at least not in the present stage of the case.

Under ordinary circumstances a Court of Equity would undoubtedly not throw out a plaintiff's suit merely because a necessary party had not been made a defendant. It would rather supply the omission, and have the cause tried in the presence of all interested. The question is, was this a case in which the Appeal Court ought to have so acted.

Now we thought, when the appeal was originally before us, that the plaintiff Brojo Gobind Doss had not acted fairly in the matter, that he had intentionally omitted and concealed facts relating to the defendant's position in his service, and had endeavoured to make him responsible for a deficit which was not his alone. And holding this opinion we could not consistently have sent back the case for re-trial, Raj Coomar being made a party. We considered it a just punishment for the disingenuousness with which the plaintiff had brought his suit to dismiss it on the technical ground, and on this point nothing has been said by the learned Counsel for the petitioner to make us change our opinion.

The same remarks apply to the petitioner's application for leave to bring a fresh suit. It was because we considered the plaintiff to have acted unfairly in bringing his suit against Chand Ram alone that we passed the order now complained of, and holding the belief it would be of course impossible for us to give permission to bring a fresh suit, even if we had the power of doing so, which may perhaps be doubted.

With regard to the provisions of section 350 of the Code of Civil Procedure, which have been quoted against our decision, we can only say that, in our opinion, the irregularity in not making Raj Coomar a defendant did affect the merits of the case very materially.

It may be that we misconstrued the plaintiff's conduct in regard to his admission of the accounts, and that the account-books were not the things referred to, but this would not benefit the petitioner. Our remarks on this part of the case had reference only to the Subordinate Judge's conduct of the proceedings, and did not affect the question of non-joinder on which the judgment turned.

On the whole, therefore, we do not see that any sufficient ground has been made out for interference with our former order, and the application must be dismissed with costs.

The 22nd April 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Usufructuary Mortgage—Forcible Dispossession—Act XIV. of 1859, s. 15—Onus Probandi.

Case No. 665 of 1872.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Chittagong, dated the 30th December 1871, affirming a decision of the Moonsiff of Putteah, dated the 27th June 1871.

Sreemutty Pran Kishoree (Defendant), *Appellant,*

versus

Chundee Churn Biswas and another (Plaintiffs), *Respondents.*

Baboo Aukhil Chunder Sen for Appellant.

No one for Respondents.

An estate was mortgaged with the stipulation that the interest of the mortgage-debt should be deducted out of the usufruct, and that, if the profits fell short, the mortgagor would make up the deficiency. After a time the mortgagor tendered the amount of the principal sum, and forcibly took possession of the property. The mortgagee sued to recover possession, and obtained a decree with wassilat.

HELD that plaintiff might have sued under Act XIV. of 1859, s. 15; but that suing as he did the *onus* was on him to produce the accounts, and show that something was due to him as interest.

Jackson, J.—WE think the decisions of the Courts below in this case are erroneous. The plaintiffs held the property in dispute by virtue of a mortgage, they having got possession and the amount of interest Rs. 13 and odd annas per cent. per annum being stipulated to be deducted out of the usufruct of the estate, the mortgagor agreeing that, if the profits fall short, he would make good that amount. It seems on the findings of the Courts below that the defendant tendered to the plaintiffs the amount of principal money, and forcibly took possession of the property in which the plaintiffs sued to recover possession of it. The case having once before come up in appeal before the District Court, a remand took place for inquiry as to whether the full amount of interest due to the plaintiffs had been recovered up to the date of ouster. Thereupon it seems that the defendant was called upon to show whether the interest had been paid in full, and he having failed to do so, possession was awarded to the plaintiffs, and not only possession, but wassilat. Now, the plaintiffs having recovered the principal money due to them, and having had possession of the property with an assignment of the usufruct for the interest, the defendant-mortgagor was entitled to demand possession of the estate. He did not do so in the regular way, but took the law in his own hands, and forcibly dispossessed the plaintiffs. Under these circumstances, if the plaintiffs thought fit to sue under section 15, Act XIV. of 1859, they might obtain a decree on the ground of having been deprived of possession otherwise than by due course of law, but they did not bring any suit for that purpose, and it seems to us, under this state of things, that they were bound to produce the accounts and satisfy the Court that something still remained due to them on account of interest. The lower Court has mistakingly placed the burthen of proof on the defendant. Its decision, therefore, must be set aside, and the case go back in order that the plaintiffs may have a reasonable time to produce their accounts. Unless they show that something is due to them on account of interest, their suit must be dismissed.

The 22nd April 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII. of 1859, s. 7—Onus Probandi.

Case No. 679 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 16th January 1872, modifying a decision of the Subordinate Judge of that District, dated the 25th May 1871.

Messrs. C. B. Skinner and Co. (Defendants), *Appellants,*

versus

Ranee Shama Soonduree (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellants.

Baboos Mohinee Mohun Roy and *Sreenath Doss* for Respondent.

Where a defendant objects under Act VIII. of 1859, s. 7, that plaintiff omitted in a former suit to include the portion which he now claims, and in respect of which he then had a cause of action, the objection being one of fact, the burden of proof lies with the objector.

Jackson, J.—It appears to us that the decision of the Lower Appellate Court in this case is correct. The suit related to some chur land which the plaintiff alleged had formed as accretion to her estate by the recession of the running river. She alleged that this land had become fit for cultivation, and she was entitled to take possession of it, but was prevented from doing so by the defendants being beforehand with her, and having taken possession of and occupied the same. Her cause of action, she alleged, arose in the year 1266.

The objection of the defendants with which we have to deal at present is one under section 7 of the Code of Civil Procedure. That section requires a plaintiff to include the whole of his claim arising out of the cause of action, but enables him to relinquish a portion of such claim with the view of bringing the case within the jurisdiction of any particular Court. It is then provided that, if the plaintiff should relinquish or omit to sue for any portion of his claim, he is debarred from afterwards bringing a suit in respect of the portion so relinquished or omitted.

The defendant's objection in this case was that the plaintiff had omitted in the previous suit to sue for the portion which she now claims, and in respect of which she then had a cause of action. It seems to us that this was objection of fact which, if the defendants made, they were bound to support. It must be supposed that they made this allegation as of a matter which was within their knowledge, and which they were capable of proving, but it seems however that they have omitted to give any evidence on the point. The plaintiff, on the other hand, has given some evidence to show that the land had accreted subsequent to the date of that suit, for a Civil Court Ameen was called, and he deposed that the land now sued for had not been in existence at the time of his inquiries in the previous suit, and considering the nature of chur lands which are continually in course of formation, it is quite consistent with probability that, after the lands had formed and had been the subject of dispute between the plaintiff and the defendants, other lands had formed in extension of the former subject of dispute. In considering on whom the burthen of proof lay, we need only accept the test proposed by Mr. Allan, *viz.*, as to who should fail if neither party offered any evidence. Now, as the objection taken by the defendants is one of fact, it is clear that, if no evidence is offered, the objection would fail.

We may further observe that the Judge was about to proceed with the trial of the case upon the other points arising in it, and, strictly speaking, this appeal ought not to have been made till after the final decision by him of all those points.

The special appeal is dismissed with costs.

The 22nd April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Grounds of Special Appeal—Findings—Admissions.

Case No. 1112 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 27th March 1872, affirming a decision of the Moonsiff of Behar, dated the 31st August 1871.

Chamroo Singh and another (Plaintiffs), *Appellants,*

versus

Tota Roy (Defendant), *Respondent.*

Mr. Piffard for Appellants.

Baboo Gopal Lall Mitter for Respondent.

The error of a Judge in stating that the rate admitted by the defendant in a rent-suit was the old rate shown in a former decision when the rates were different was HELD to be no ground for special appeal. Where a defendant admitted having held a certain quantity of land as *bhaolee*, but pleaded that it had been washed away by the river, and the first Court regarded the plea of submission to be untenable, HELD that this could not be treated as an absolute finding that there had not been diluviation of the land, and that the Court was not bound to fix upon that part of defendant's statement which contained the admission, and hold him liable for the rent of the *bhaolee* land.

Couch, C.J.—The first ground of appeal states that the Judge has erred in stating

that the rate admitted by the defendant in the present suit, in respect of the *nugdee* land, is the old rate as shown by a former decision; then it states the rate given by the former decision and the rate given in the present suit. Now, that is not a ground of special appeal. A special appeal can only be brought when the decision is contrary to some law or usage having the force of law, or there is a substantial error or defect *in law* in the procedure or investigation of the case. If there is any such error as is described in the first ground of appeal, it is not an error in law at all; it is an error of fact, and cannot be a ground of special appeal. If the Judge had really fallen into such a mistake, the proper course would have been to apply to him for a review of his judgment.

The second ground of appeal is that when the defendant "admits having held 5 beeghas and 5 cottahs of land as *bhaolee*, but pleads that they have been washed away by the river, which plea the Court of first instance held he had failed to establish, then your petitioner was entitled to a decree on account of the rent of the *bhaolee* land aforesaid," that is, on account of the 5 beeghas and 5 cottahs.

It appears that the defendant, in the first part of his written statement, absolutely denied that he held any *bhaolee* land. He afterwards stated that there were 5 beeghas and 5 cottahs of *bhaolee* land formerly held by him, and which had become submerged.

The Moonsiff as to that says that this plea of the land being submerged seems to be untenable, and that it is quite inconsistent with reason, and that no reliable evidence has been adduced by the defendant on that point that the *bhaolee* land only had been diluviated.

We think it is unfair to the defendant to treat this as an absolute finding of the Court that there had not been a diluviation of the land as he alleged. No doubt he failed to prove his allegation; but the Court was not bound, considering the whole of his written statement, to fix upon that part which confined the admission as to his having held 5 beeghas and 5 cottahs of *bhaolee* land, and to treat him as liable to pay the rent for it. It might have been used as evidence against him for what it was worth. Perhaps, looking at the nature of the written statement, it was not worth much, and it would not be fair to attach such weight to it as to allow it to form part of a ground of special appeal. At any rate, to enable the Court to act upon it, and pass a decree against the defendant for the rent of that quantity of land, it would be necessary for the present appellant to show that in point of law the Judge was bound, upon seeing that the defendant had failed to prove his allegation as to the diluviation, to take the other part of the admission as conclusive upon the face of his holding that quantity of *bhaolee* land, so as to make him liable for the rent of it. We think the Judge was not bound to do that. There is no law which obliged him to do it; he was at liberty to give such effect to the admission as he thought right. The plaintiff ought to have given, as the Court said, some evidence of the quantity of *bhaolee* land held by the defendant. When he asked the Court for a decree against the defendant for the rent of *bhaolee* land, he ought to have given the Court the materials which would have enabled it to give a proper judgment upon that matter. We do not see any ground for the special appeal. It will be dismissed with costs.

The 22nd April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Joinder of Causes—Act VIII. of 1859, s. 8—Jurisdiction.

Case No. 1020 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 15th April 1872, affirming a decision of the Moonsiff of that District, dated the 20th December 1871.

Lalla Bhugwan Sahoy and others (Plaintiffs), *Appellants*,

versus

Sungessur Chowdhry and others (Defendants), *Respondents*.

Mr. R. E. Twidale for Appellants.

No one for Respondents.

Two causes of action, one by plaintiff as purchaser of arrears of rent, and the other for rent due, were held to be properly joined in one suit cognizable by the Civil Court without any such distinction as that of different sides of the Court; the case to be decided according to the law of limitation or other law applicable to the different parts of the claim.

Couch, C.J.—In this case there appears to be two causes of action. One for two

years' rent by the plaintiff as the purchaser of the arrears of rent due in respect of those years, the purchaser in fact of a debt for which he must sue in the Civil Court, and it is not a suit for rent due to the plaintiff, The other is a cause of action for what may be correctly described as rent. Now the Civil Courts have jurisdiction in both suits. They have always had jurisdiction in a suit for the first cause of action, and now they have jurisdiction in a suit for rent. Then the law provides in section 8 of Act VIII. of 1859 that "causes of action by and against the same "parties, and cognizable by the same Court, "may be joined in the same suit, provided "the entire claim in respect of the amount "or value of the property in suit does not "exceed the jurisdiction of such Court." And these causes of action being now cognizable by the Civil Court, they may be joined in one suit. Both the lower Courts were clearly wrong in considering that the suit ought to be dismissed, because it was not a suit for rent, and ought to be brought on what they apparently considered to be another side of the Court. According to the judgment in the 19 Weekly Reporter, page 160, there is no such distinction of one side of the Court and another. If this suit is cognizable by it, the Court is to try it, applying to the different causes of action the law which is applicable to each—the law of limitation or other law—and is to decide the case according to the law applicable to the different parts of the claim. The decrees of both Courts must be reversed, and the suit must be remanded to the Moonsiff for trial. The costs of the suit will follow the result.

The 22nd April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Deed of Sale—Construction.

Case No. 1019 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 4th April 1872, reversing a decision of the Subordinate Judge of that District, dated the 13th December 1871.

Cheetun Lall (Plaintiff), *Appellant*,

versus

Chutterdharee Lall and others (Defendants), *Respondents*.

Messrs. Lingham and *R. E. Twidale* for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

In construing a deed of sale, where the terms are ambiguous, the conduct of the parties immediately after, and acting upon the deed is very important; such conduct being sometimes (as in this instance) the only means by which the Court can know how the price of land was fixed.

Couch, C.J.—On the 2nd of February 1866 the plaintiff sold to the defendant [illegible] annas out of 8 annas of the entire 16 annas of the mouzah named in the deed of sale. To the description of it therein were added the words "known in the mofussil, settled in the year 1197," and after general words calculated to pass all the various appurtenances of the mouzah, there is an exception of "ancient charitable lands." The plaintiff says that the defendants took possession of six beeghas and a half of land on the 15th of September 1866 under color of this deed of sale, and he now seeks to recover the quantity of land upon the ground that it was not included in the deed.

It does not appear when the defendants took possession of the part of the land sold which the plaintiff does not dispute passed by the deed of sale; but we think we are entitled to assume that possession was taken of all at one time, and that in fact the defendants took possession in September 1866 of the property which they, at the time, supposed was included in it, and which they had become entitled to by it.

Then the plaintiff brings his suit on the 6th of January 1871, claiming possession of the six beeghas and a half and wassilat for the whole period of nearly five years, thereby showing that the defendants had been in possession during all that time of the six beeghas and a half, as well as of the other land comprised in the deed. The plaintiff cannot now suggest anything to the contrary of that, because he founds his claim upon the defendants being in possession. Under these circumstances, it is for the plaintiff to show that the six beeghas and a half did not pass to the defendant by the deed of sale.

The Judge of the Appellate Court, whose decision is final as to the facts of the case, finds distinctly that there is no land, except possibly one beegah, of the description mentioned in the exception "ancient charitable lands." He is a gentleman, we understand, of considerable experience in that part of the country, and we think, when he says that this is a kind of exception which is made use of commonly in deeds of sale, it must be taken that he is saying what is correct, and that he understood what was ordinarily meant by such an exception. He finds that there is no land which would come within the exception.

Then, does the plaintiff show that these six beegahs and a half did not pass by the deed of sale? The introduction of this exception to some extent indicates that the parties considered that everything coming within the description of the mouzah would pass, and that it was necessary to except lands of this description. The words "settled in 1197" cannot fairly be read as cutting down the other part of the description, and making it to mean a sale of the mouzah as it was settled in 1197. If the words "as it was settled" had been used, it might fairly have been said that they were an essential part of the description of what was sold. But we consider that the words "settled in 1197," as they occur in this deed, are not an essential part of the description of the land. They are merely an additional description, but not one which qualifies or controls the description before given, and limits it to what was settled in 1197. That appears to us to be the plain meaning of the language of this deed.

Of course, we are applying to this deed the rules of construction which we should apply, not to a technical English deed, but to any ordinary instrument drawn up even by the parties themselves. This is not a question of technical construction. We think the meaning cannot be cut down in the way that was contended for.

But, supposing that these words are ambiguous, and may be read in that way, we have that is a very significant and important fact, namely, that the defendants acted upon this deed according to the meaning that it would pass all the mouzah with the exception of ancient charitable lands. They took possession accordingly, and it does not appear that any objection was made to their doing so until this suit was brought. The conduct of the parties is very important—conduct immediately after and acting upon this deed, not conduct long after, and independent of it. It was the taking possession under this instrument of sale, and, so far as it appears, not disputed for nearly five years. The plaintiff might have shown the contrary, if it could be done. He now seeks to get back the six beegahs and a half, and, his case being that that part of the land was not sold, he is bound to make it out clearly. We have no means of knowing how the price of the land was fixed, but from the conduct of the parties, it would seem that the defendants thought they were giving their money for the whole of the land for that which they took possession of. The plaintiff ought to have satisfactorily shown that it was not intended that the six beegahs and a half should pass.

We think the decision of the Appellate Court is right, and that the appeal ought to be dismissed with costs.

The 22nd April 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Deed of compromise—Construction.

Case No. 745 of 1872.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of Chittagong, dated the 10th February 1872, reversing a decision of the Moonsiff of Satkalya, dated the 28th September 1871.

Mahomed Hashim and another (Plaintiffs), *Appellants,*

versus

Hossein Ali and others (Defendants), *Respondents.*

Baboo Aukhil Chunder Sen for Appellants.

Baboo Grija Sunkur Mojoomdar for Respondents.

Case.—A suit for a kubooleut having been brought in the Revenue Court, a deed of compromise was filed in the suit, in which it was stipulated that a certain sum would be paid by the defendants to the zemindar as rent of four kanees of land, including homestead, after mutation of names; that Rs. 15-8 on account of outstanding balance and charges connected with the rents would be paid to plaintiffs within a month; and that, in default, the defendants would have no right to the lands specified. The defendants having failed to fulfil the conditions, plaintiffs executed their decree, and realized from them the balance above mentioned, and, having sued them for the rent, obtained a decree. Plaintiffs then brought this suit to recover possession, in virtue of itmamee right, of the land on the ground of non-fulfilment of the conditions of the compromise. The first Court gave them a decree, which the Lower Appellate Court reversed, holding that the deed merely imposed a penalty with a view to punctual payment.

HELD that, as what the defendants had to do was of a perpetually recurring nature, and no action which the Court might take would be effectual in preserving the plaintiff from being sued by the zemindar, the intention was that the terms should be strictly enforced on failure to perform the conditions, and that the defendant should be obliged to surrender the lands.

Jackson, J.—THERE appears to be no question that the deed of compromise relied on by plaintiff in this case was really executed. The sole question that remains is, whether the condition specified in that deed is one which ought to be, and must be, carried out, or should be dealt with, as a mere penalty held out *in terrorem* in case of failure by the defendant to comply with the terms thereof. It is also clear that the defendant has failed to comply with those terms. He has not paid to the plaintiff the sum stipulated therein, nor has he got his name registered in the zemindar's serishtah, the consequence of which has been that, although plaintiff has given up the land, he has been sued for rent by the landlord. The Subordinate Judge, reversing the decision of the Moonsiff, has held that the conditions stated in the deed merely imposed a penalty with a view to the punctual enforcement of the terms.

Now, if the acts to be done by the defendant were of such a nature that the Court, by interfering once for all, could compel the execution of those terms, we should not be inclined to disturb the decision of the Court below, but that which the defendant had to do was of a perpetually recurring nature, and no action which the Court might take would be effectual in preserving the plaintiff from being sued and harassed by the zemindar. It seems to us, in this state of the facts, that the intention of the parties was that the terms in the deed should be strictly enforced on failure to perform the conditions therein stated, and that the defendant should, therefore, be obliged to surrender the land which was given him on certain conditions. The judgment of the Lower Appellate Court is reversed, and that of the first Court restored with costs.

The 23rd April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Benamee and beneficial purchasers—Suit for possession—Property in different districts—Execution-sale—Certificate under Act VIII of 1859, Section 286—Error of procedure.

Case No. 12 of 1872.

Regular Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 12th October 1871.

Kalee Prosunno Bose (Plaintiff), *Appellant*

versus

Dinonath Bose Mullick (Defendant), *Respondent.*

Mr. J. T. Woodroffe and *Baboos Mohesh Chunder Chowdhry* and *Anund Chunder Ghosal* for Appellant.

Mr. Advocate-General and *Baboos Sreenath Doss* and *Bhugobutty Churn Ghose* for Respondent.

In a suit to recover possession of property which was purchased by one party in the name of another, the real purchaser ought, by the rule of Courts of Equity, to be a

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-plaintiff. Where this is not the case, a decree obtained y the plaintiff may be reversed on appeal, as the real urchaser, not having been a party, would not be bound y such decree.

Where an estate, which is entered on the towjee of e Collectorate of a district, consists of villages of which ly the greater number are situated within that dis-ict, it may, for the purposes of attachment and sale in ecution of a decree, be considered as wholly situated that district, and be so dealt with by the District ourt.

Where a decree has been executed by a Court other an that by which it was passed, the title of the pur-aser may not be avoided by showing that there was operty of the judgment-debtor within the jurisdiction the Court that passed the decree which might have en attached and sold. Strictly speaking, until the tter property was sold, the certificate under Act VIII. of 59, Section 286, should not have been granted; but the ror, though ground for an appeal, does not make void e certificate.

Couch, C.J.—THE facts of this case are at the Land Mortgage Bank, having obtain-d a decree in the Court of 24-Pergunnahs gainst Hubeebul Hossein and his wife oreentunnissa Bibee for Rs. 2,48,991-4, incipal and interest, and Rs. 4,493-12, sts and interest, applied to that Court for ecution of the decree by attachment and le of a dwelling-house and land in Bhowa-ipore in Zillah 24-Pergunnahs, and of roperty described as Lot Khosdaha, Per-unnah Khosdaha, in Towjee No. 298, in illah Nuddea, the Government revenue of hich is Rs. 11,261-11-4. On the 25th of ugust 1869, it was ordered that the pro-erty situated within the local jurisdiction of e Court of 24-Pergunnahs should be ttached. On the 26th of August, the Land Iortgage Bank by its manager petitioned e Judge that the property in 24-Pergun-ahs should be sold, and a certificate be ranted as regarded the property situated in illah Nuddea, for the attachment and sale ereof in that zillah. On the 1st of Sep-mber, it was ordered by the Judge of 24-ergunnahs that the original certificate, copy f the decree, and copies of the two petitions, hould be sent to the Judge of Zillah Nud-ea, and the case should be struck off from e file of the cases pending decision in that Court. The attachment and sale of the pro-erty in 24-Pergunnahs was not proceeded ith. The striking off the file of the Court eems to have been improper, and we fear as caused by the very prevalent desire to how as few pending suits as possible. The ertificate of the Judge of 24-Pergunnahs, lated the 1st of September, states that no ortion of the amount of the decree had been alized by means of that Court. The Land Mortgage Bank thereupon applied to the Subordinate Judge of Nuddea for execution of the decree by attachment and sale of the right, title, and interest of the judgment-debt-ors in "Kismut Khosdaha lying within "Thannah Gyeghatta, Mehal No. 298 of the "Towjee of the Collectorate of this zillah, "the Government revenue of which is Rs. "11,261-14-4, and which is recorded in the "name of Hubeebul Hossein." It was accordingly attached and sold by auction to the respondent for Rs. 3,00,100.

Kismut Khosdaha consists of 60 mouzahs, 18 in Zillah 24-Pergunnahs and 42 in Zillah Nuddea, the whole being entered in the Towjee of the Collectorate of Nuddea as "No. 298, Pergunnah Kismut Khosdaha, "Talookdar Hubeebul Hossein, Government "revenue Rs. 11,261-14-4." Hubeebul Hossein applied under Section 256 to have the sale set aside; and the case was tried on the 14th of April 1870, when the Subordi-nate Judge of Nuddea ordered that the sale should be confirmed. Among the pleaders present on behalf of Hubeebul Hossein was Baboo Kedar Nath Bose.

The plaintiff's case is that the Nuddea Court had no power to sell the 18 mouzahs situated in 24-Pergunnahs, and that the sale of them was void. He alleges in his plaint that Hubeebul Hossein, in consideration of Rs. 5,000, absolutely sold to him on the 19th Magh 1277 (31st January 1871) what-ever rights and interests he had in those mouzahs. But the evidence of Kedar Nath Bose, who was examined as a witness for the defendant, and who says that he was Hubee-bul Hossein's pleader in almost all cases, shows that he was the real purchaser. He says he and the plaintiff, who is his cousin, are living jointly, and the property, if recovered, will become their joint-property. It has been objected for the respondent that the suit ought to have been dismissed, because the plaintiff was not the real purchaser. In Fuzeelun Bibee *v.* Omdah Bibee, X. Weekly Reporter 469, it was held that, where a purchase was made in the name of another, the real purchaser must be the plaintiff, and the suit cannot be maintained in the name of the other person. Taking the evidence of Kedar Nath Bose to be entirely true, he ought, by the rule of Courts of Equity, to have been a co-plaintiff; and for his not being so, the decree might be reversed on an appeal; the reason being that Kedar Nath Bose will not be bound by the decree in this suit.

We think this would be a sufficient reason for our dismissing this appeal. A false case

as to the purchase has been put forward in the plaint; and we have little doubt that this was done designedly, and in order to conceal the part which Kedar Nath Bose had taken in the transaction.. It is, however, desirable that the case should be decided on its merits. We think the Nuddea Court had power to sell the whole estate, and that, for the purposes of attachment and sale in execution of a decree, it must be considered as wholly situated in Zillah Nuddea. If the Court of 24-Pergunnahs sold the 18 mouzahs, it would have no power to apportion the Government revenue. The purchaser would be liable to pay the whole, and would be involved in constant disputes with the owner of the other mouzahs. Selling the estate thus in parts would greatly lessen the price that could be got for it, to the injury either of the decree-holder or the judgment-debtor, but possibly to the benefit of speculative persons, such as the pleader Kedar Nath Bose seems to be in this instance. Unless the law is imperative, this ought to be avoided. The Code of Civil Procedure has no special provision for such a case as this; "Part of an estate" in Section 149 means, we think, an aliquot part of an estate, which must frequently be attached and sold. In the proceeding in the Nuddea Court, it was possible to follow the directions of the Code as to making known the prohibitory order (Section 239) and as to sales (Sections 248, 249), and they have been followed. There is no direction in the Code to the contrary of this proceeding; and it appears to us that the estate may, as we have said, be considered as wholly in Zillah Nuddea. Then, so considering it, was the Nuddea Court authorized to sell? Section 284 says that a decree, which cannot be executed within the jurisdiction of the Court, whose duty it is to execute it, may be executed within the jurisdiction of any other Court in the manner following. The plaintiff (Section 285) may apply to the Court, whose duty it is to execute the decree, to transmit a copy of it with a certificate that satisfation of it has not been obtained by execution within the jurisdiction of that Court. It will be observed, it is not that the decree cannot be executed. The Court (Section 286), unless there be any sufficient reason to the contrary, is to cause the certificate to be prepared and transmitted to the Court which is to execute the decree; and (Section 287) the copy of any decree or order for execution, when filed in the Court to which it has been transmitted for execution, is to have the same effect as a decree or order for execution made by that Court. There was a certificate of the Judge of 24-Pergunnahs that the amount of the decree had not been realized by means of that Court. It was made upon the application of the plaintiff (The Land Mortgage Bank) in accordance with Section 285, and there was a decree to be executed. Those two facts were sufficient to give the Court of 24-Pergunnahs jurisdiction to grant the certificate. Strictly, it ought not to have been granted until the house and land in 24-Pergunnahs had been sold; but this error does not make the certificate void, and avoid the proceeding in the Nuddea Court. There is a wide distinction between a proceeding without jurisdiction, or in excess of jurisdiction. and erroneous proceeding in a matter within jurisdiction. The latter is a ground for an appeal, and one was presented; but not till the 15th of June 1870. after the time allowed by law. In the case in IX. Weekly Reporter 346, there was an appeal, and we understand the language of the Court in the judgment as used with reference to the case before it. We do not think the learned Judges intended to lay down that. where a decree has been executed by a Court other than that by which it was passed, the title of the purchaser may be avoided by showing that there was property of the judgment-debtor within the jurisdiction of the Court that passed the decree which might have been attached and sold. The judgment, indeed, goes so far as to say that it is only when the decree cannot be executed against the property or *person* of the judgment-debtor that it may be sent to another Court for execution. This would render it necessary in all cases before a decree is sent to another Court for execution for the sending Court to enquire whether the defendant can be arrested, and, if he can, to refuse the application. We believe it has not been the practice to do this. We are of opinion, upon the facts of the case that the decree of the Lower Court is right, and the appeal ought to be dismissed with costs.

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RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 29th November 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act XLV. of 1860, Section 289—Danger to persons.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Mymensingh.

Chand Manal, *Petitioner.*

The High Court refused to interfere with an order passed under Section 289 of the Penal Code by a Magistrate fining the owner of a pony which had been tied negligently, which was running about loose in a crowded bazar, and thereby endangering the lives and limbs of persons, that Section referring, not only to savage animals, but to any animal.

Reference.—THE Deputy Magistrate of Jamalpore, Mr. Donough, seeing a pony galloping about loose on the public road, caused the animal to be seized, and ordered the owner to be produced before him in Court. His sanction for this, he explains, was Section 88, Code of Criminal Procedure.

Brought before the Court, the owner, no depositions on solemn affirmation having been recorded, was called on to show cause why he should not be punished under Section 289 of the Indian Penal Code.

The owner pleaded that the animal had been tied up, but had broken loose from his fastening.

This was considered unsatisfactory, and the accused was summarily punished with a fine of Rs. 10, or, in default, with simple imprisonment for 10 days.

The Deputy Magistrate, Mr. Donough, in explanation states that, as the case was one under Chapter XV., he did not consider any formal or lengthy proceedings necessary.

I submit that the Deputy Magistrate's order should be set aside on the following grounds:—

1st.—Because the arrest of the owner of the pony was illegal, no offence having been committed; and the proceedings held on the trial were equally so.

2nd.—Because a pony is not an animal by disposition or nature so ferocious and dangerous as to be within the purview of Section 289; and that it cannot with reason be said that, owing to the pony in question being loose even in a thoroughfare, that there "was any *probable danger to human life*, or any *probable danger of grievous hurt* from such animal."

Judgment of the High Court.

Glover, J.—We see no reason to interfere in this matter. Section 289, Penal Code, does not refer to savage animals alone, but to any animal; and it is quite possible that a pony running away through a crowded bazar, albeit a perfectly good-tempered beast on all ordinary occasions, would create a most probable danger to the lives or limbs of the men, women, and children walking on the road.

In this case it is found as a fact, which we must, of course, accept, that the owner of the pony negligently omitted to fasten the animal securely, and that, at the time the pony was galloping about loose, the bazar was crowded with people.

The 29th November 1872.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Act XXV. of 1861, Sections 284 and 293—Surety—Recognizance—Breach of the peace—Forfeiture of bond—High Court.

(Miscellaneous Cases.)

Nilmadhub Ghosal and others, *Petitioners.*
Judoonath Roy and others, *Petitioners.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Petitioners.

A Magistrate should have due regard to the circumstances of the case and the means of the parties when fixing the amount in which the sureties should be bound in a case under Section 284 of the Code of Criminal Procedure. Under the provisions of Section 293, a Magistrate cannot direct the forfeiture of a portion of the penalty.

Where the amount of the recognizances were wholly out of proportion to the nature of the dispute, and to the means of the parties, the High Court held they could not interfere, but the Government might be moved in the matter.

Kemp, J.—These two petitions, namely, the petition of Nilmadhub Ghosal and others, and that of Judoonath Roy and others, have been considered together, and one judgment will govern the two petitions. It appears that a dispute existed between Baboo Mudun Lal on one side, and Thako Monee on the other side, respecting a chur. The Magistrate, acting on the information obtained by him upon the petition of Nilmadhub Ghosal, and the police-report of Thannah Kulna, proceeded, under Section 282 of the Criminal Procedure Code, to call upon the parties to attend and show cause why they should not be required to enter into a bond to keep the peace. Subsequently, in the case of Nilmadhub Ghosal and others, two witnesses were examined, and the Magistrate thought proper to bind down Thako Monee in the sum of Rs. 50,000, Nilmadhub Ghosal in the sum of Rs. 10,000, Ram Tarun Chatterjee in the sum of Rs. 10,000, and Peeroo Sheikh, Aizuddee Sheikh, and Shookmoyee Moochee, in the sum of Rs. 1,000 each. The other party, namely, Judoonath Roy and others, were bound down in the same sums and in the same proportion. In their case it does not appear that any witnesses were examined, but it is clear from the record that, on their applying for the issue of summons, summons was issued, and on the 9th of September, when the case was taken up, the Deputy Magistrate records an order, to the effect that the petitioners, namely, Judoonath Roy and others, were not willing to have any witnesses examined, and that they would not produce any witnesses for examination. Subsequently, the parties were bound down to keep the peace; and after the execution of the bonds, an unlawful assembly took place, the circumstances attending which seem to us to have been of a very trivial character. It appears that the servants of Mudun Lal Baboo went to the cutcherry of Thako Monee, and sacrificed a goat there, danced before the cutcherry, and did other acts which were calculated to offend Thako Monee and her partizans. Subsequently, on the same day, on the return of Judoonath Roy and others from the river-side, Thako Monee's party, by way of retaliation, seized the goats, and assaulted the servants of Mudun Lal. Both parties appear to have been convicted under Section 143 of the Penal Code; and as there were no circumstances of a serious character attending this disturbance, the Magistrate thought fit to sentence the men of one party to only two weeks' imprisonment with fine, and the other party to one week's imprisonment. Against this conviction no appeal was preferred. The Deputy Magistrate then proceeded, under the provisions of Section 293, to enforce the forfeiture of the sums covered by the bonds. The total sum covered by these bonds amounts to something like one-and-a-half lac of rupees. We have not been shown that the Deputy Magistrate exercised a sound discretion under Section 284, in fixing the amount in which the sureties should be bound. Under that Section, we think that it was his duty to have had due regard to the circumstances of the case and the means of the parties. However, be that as it may, under Section 293, the Deputy Magistrate recorded the grounds of proof, under which he considered that the sums covered by these bonds had been forfeited, and he directed the parties to pay the penalty thereof, or to show cause why it should not be paid. Now, as already observed in the case of Nilmadhub Ghosal and others, two witnesses were examined; in the case of Judoonath Roy and others, no witnesses were examined, but that was the fault of the petitioner, and not of the Court.

In appeal to this Court, the main grounds taken are that the Deputy Magistrate has relied entirely upon the evidence in the case under Section 143, and that he has not paid any attention to the additional evidence which was adduced on the part of Nilmadhub, and that, therefore, the provisions of Section 293 have not been complied with; and the second ground was that the Magistrate ought not to have ordered the forfeiture of the whole amount.

With reference to the first ground, we have already shown that the Deputy Magistrate did take evidence in the case of Nilmadhub, and that he was not wrong in saying that the other party, namely, Judoonath and others, took no steps whatever to adduce evidence to show cause why the penalty covered by the bonds should not be enforced. Section 293 enacts that, whenever it may be proved, that is to say, proved by evidence taken in the presence of the parties before a Magistrate, that any recognizance or other bond taken under this Chapter has been forfeited, he shall record the grounds of such proof, and shall call upon the person bound by the bond to pay the penalty thereof, or to show cause why it should not be paid. In this case, the Deputy Magistrate did record the grounds of such proof, and he states that it has been proved in the case of unlawful assembly that

these parties did commit a breach of the peace subsequent to the date on which they executed these penalty-bonds. In the case of Nilmadhub, we cannot say that the Deputy Magistrate did not consider the additional evidence adduced by that party. Now, in the Full Bench case to be found in Vol XII., Weekly Reporter, Criminal Rulings, the late Chief Justice, Sir Barnes Peacock, observes that it appeared to him that, before a person can be called upon to give a bond to keep the peace, the Magistrate must adjudicate on the question as to whether there is reasonable ground for believing that he is likely to commit a breach of the peace, and that he must adjudicate on that point in the way in which he must adjudicate in all other cases, after taking evidence in the presence of the person charged, and giving him an opportunity to cross-examine the witness. In that judgment, a distinction was made between a call by a Magistrate under Section 282 for a person to show cause why he should not enter into a bond to keep the peace, and the case in which a Magistrate, after hearing any evidence that may be adduced on the part of the person called upon to show cause, directs that person to enter into recognizances. Now, in this case, the Magistrate, although he proceeded in the first instance under Section 282 upon the petition of Nilmadhub and the report of the police-officer, he subsequently, after giving the parties an opportunity to show cause, and directing them to enter into recognizances to keep the peace, acted on legal evidence taken in the presence of the parties, in addition to the report of the police and the petition of Nilmadhub.

With reference to the second objection, namely, that the Magistrate ought not to have directed the forfeiture of the whole amount covered by the bonds, we have been referred to the case of Jehan Bux, reported in Vol. XV., Weekly Reporter, page 88. In that case Mr. Justice E. Jackson made the following remarks: "It is not necessary, then, to consider the question whether, when recognizances are forfeited, the Magistrate is bound to forfeit the whole amount of the bond;" and that "it is only the Government which can reduce the sum to a penalty corresponding to the breach of the peace which has taken place;" and the learned Judge goes on to say that he should hesitate very much before coming to any such conclusion, notwithstanding the decision of the Bombay High Court to the contrary." Mr. Justice E. Jackson passed no decision on the point, but there is, as he observed, the decision of the Bombay High Court taking a different view. We think that, under the provisions of Section 293, the Deputy Magistrate could not direct the forfeiture of a portion of the penalty. The Section distinctly says that, after recording the grounds of such proof, the Magistrate shall call upon the person bound to pay the penalty of the bond, or to show cause why it should not be paid. In this case, we think that the amount of the recognizances is wholly out of proportion to the nature of the dispute which appears to us to have been a petty one; and it is also, having due regard to the circumstances of the case and the means of some, if not of all, the parties, very excessive. The disturbance which took place was a very trivial one, as already stated in our judgment; and we have no doubt that, if the Government are moved in the matter, the Government will probably not think fit to enforce in this case the forfeiture of this very large sum. This Court is unable to interfere, as no law has been made out.

We therefore reject this application.

The 29th November 1872.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Act VIII. of 1869, Section 132A—Disposal of property—Jurisdiction.

(Miscellaneous Case.)

Rash Mohun Goshamy and another, *Petitioners,*

versus

Kali Nath Raha and another, *Opposite Party.*

Baboo Grish Chunder Ghose for Petitioners.

Baboos Nullit Chunder Sein and *Shoshee Bhooshun Sein* for Opposite Party.

Under Section 132A, Act VIII. of 1869, no order can be passed with reference to the disposal of any property in a Criminal Court, unless that property is produced before the Court; such order must be made at the time of passing judgment.

Kemp, J.—We think that the order of the Officiating Sessions Judge, dated the 3rd of September 1872, namely, "that the "Lower Court shall make over the buffaloes "to the person from whose undoubted pos-"session they were taken, leaving Gour

"Hurry Gope to sue in the Civil Court," must be set aside as passed without jurisdiction. We purposely refrain from giving any opinion as to the title to these buffaloes. The Magistrate, when the case of riot was before him, distinctly refused to pass any order with reference to the buffaloes, and we think that the Magistrate was right in doing so under the provisions of Section 132A of Act VIII. of 1869. The property, namely, the buffaloes, were not produced before the Magistrate, and therefore, at the time of passing judgment. the Magistrate distinctly refused to pass any order with reference to their disposal. An appeal was preferred to the Sessions Judge, and the Sessions Judge also distinctly refused to interfere with reference to the disposal of the buffaloes. This order was passed by Mr. A———. Subsequently, the present Judge, Mr. G———, has passed the order, which is now the subject of this appeal. We think that this order has been passed without jurisdiction, firstly, with reference to the provisions of Section 132A of Act VIII. of 1869, inasmuch as no order can be passed with reference to the disposal of any property in a Criminal Court, unless that property is produced before the Court, and such order made at the time of passing judgment. Secondly, we think the order is without jurisdiction, inasmuch as the Magistrate had distinctly refused to pass any order with reference to the disposal of the buffaloes, and, on appeal to the Sessions Judge, that order was confirmed by the predecessor of Mr. G———, Mr. A———. We therefore think that any order passed by Mr. G———, in opposition to the order of his predecessor, was without jurisdiction.

We reverse the order of the 3rd of September last as passed without jurisdiction.

The 29th November 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Storing Jute—License—Act XXV. of 1861, Chapter XV.—Act II. (B. C.) of 1872, Sections 4 and 34.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of 24-Pergunnahs.

Bhugwan Chunder Koondoo and another, *Petitioners.*

Before a conviction for storing jute in a warehouse without a license can be had under Section 4 of Act II. (B.C.) of 1872, proceedings should be taken under the provisions of Chapter XV. of the Code of Criminal Procedure, as required by Section 34 of the former Act.

Reference.—THE accused, Bhugwan Chunder Koondoo and Essur Chunder Nag, were convicted by a Municipal Commissioner of storing jute in certain premises without license, under Section 4 of the Jute Warehouse Act, and were fined Rs. 50 and 25 respectively.

It appears to me that the proceedings of the convicting officer were irregular and illegal, and should be quashed.

Section 34 of the said Act requires that offences punishable under that Act should be dealt with under the provisions of Chapter XV. of the Criminal Procedure Code, but no proceedings were taken in these cases under the provisions of that Chapter.

The person fined is not the owner of the premises where the jute was stored.

Judgment of the High Court.

Kemp, J.—We concur with the Sessions Judge, and quash the proceedings of the convicting officer.

From the memo. of the Vice-Chairman of the Municipal Commissioners, it is clear that the offence, if any, was not dealt with under the provisions of the Criminal Procedure Code, as required by Section 34, Act II. of 1872 (B. C.).

The 30th November 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Offence—Complaint—Post Office Act—Act XXV. of 1861, Section 68—Act XIV. of 1866, Section 48.

(Miscellaneous Case.)

Panna Lall Mookerjee, *Petitioner.*

Baboo Bhobanee Churn Dutt for Petitioner.

To give a Magistrate jurisdiction to take cognizance of an offence without any complaint under Section 68, Code of Criminal Procedure, there must be an offence committed which is punishable under the Penal Code or under some special Act.

Per Kemp, J. (Glover, J., doubting).—That the opening of a newspaper by a person employed in the Post Office, and replacing it in its envelope, does not constitute an offence under Section 48, Act XIV. of 1866, as it could not be said that the accused stole, fraudulently appropriated, wilfully secreted, destroyed, or threw away any letter or other article sent by post.

Per Kemp & Glover, JJ.—There must be a fraudulent intention in the act of the accused before he can be convicted under the Section (48).

Kemp, J.—THIS is an application on behalf anna Lall Mookerjee, who is second writer the Dum-Dum Post Office. The grounds en by the pleader who appeared for the tioner are: 1st, that there is no prosecu- in accordance with the provisions of the minal Procedure Code; 2ndly, that the ence charged, if proved, is not a criminal ence, although it may be a dereliction of ty on the part of the petitioner as a clerk, ich can be taken notice of by the depart- ent under which he is employed; and, lly, that this Court ought to interfere der Section 35, and direct the transfer the case from the file of the Cantonment gistrate of Dum-Dum to the Magistrate's urt of the 24-Pergunnahs or to any other mpetent Court, on the ground that the ntonment Magistrate has written a letter the Magistrate of the 24-Pergunnahs, om which letter it is clear that he has in a asure prejudged the case.

It does not appear in this case that any mplaint was made, but under Section 68 e Magistrate of a District, or Magistrate charge of a Division of a District, may, hout any complaint, take cognizance of "offence" which may come to his know- ge. There is nothing on the record to ow that the knowledge of the Cantonment gistrate in this case is "either a person- knowledge, or a knowledge derived from stimony legally given" (see judgment of r. Justice Phear in the case of the peti- n of Surendro Nath Roy,* page 275, ngal Law Reports, Vol. V.). But we are arly of opinion that in this case no offence s been committed. Section 68 does cer- nly give the Magistrate power to take gnizance of an offence without any com- aint, but there must be an offence commit- d which is punishable under the Penal ode or under some special Act. Now, it is id in this case that the petitioner, who was clerk in the Dum-Dum Post Office, slipped the cover of a vernacular newspaper, d it, and re-placed it in its envelope. tion 48 of Act XIV. of 1866 enacts that Whoever, being in the employ of the Government in the Post Office Department, hall steal, fraudulently appropriate, or ilfully secrete, destroy, or throw away, ny letter or other article sent by post, or ything contained in any such letter or her article, or shall mutilate or break pen any such letter or other article, or any ail bag or box, with the *intention* of "fraudulently appropriating anything there- "in contained, shall be punished, on conviction "before a Criminal Court, with imprison- "ment of either description, as defined in "the Indian Penal Code, for a term not ex- "ceeding seven years, and shall also be liable "to fine." Now, it cannot be said in this case that the petitioner stole, fraudulently appropriated, wilfully secreted, destroyed, or threw away any letter or other article sent by post; and it does not appear that there was any "intention," the gist of the offence, on his part of fraudulently appropriating any letter or other article sent by post. We, therefore, being of opinion that no offence has been committed, quash the proceedings, and direct the immediate release of the petitioner.

Glover, J.—I am quite of the same opinion. I merely wish to add that I am not by any means certain that the wording of Section 48, Act XIV. of 1866, would not include the "opening" of newspapers; but under any circumstances I quite agree with Mr. Justice Kemp in holding that there was no fraudulent intention in the act of the petitioner. I think, therefore, that the proceedings should be quashed.

The 4th December 1872.

Present:

The Hon'ble L. S. Jackson, *Judge.*

False charge—Search of house—Section 211, Penal Code.

The Queen

versus

Hunooman Lall, *Appellant.*

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Sarun, on a charge of bringing a false charge of murder with intent to cause injury under Section 211 of the Penal Code.

Where a person, who is interested in the matter, or has a certain official responsibility, says to a police-officer, "A tells me that X has committed a certain offence, "and B and C confirm the statement, and I accordingly "suspect X," and follows up that statement by an application to have X's house searched, he prefers a charge against X. If such charge be false, he may be convicted under Section 211 of the Penal Code.

Jackson, J.—IN my opinion, the Court of Session had grounds for finding, and substantially did find, that the conduct of the prisoner, Hunooman Lall, amounted to the

* 13 W. R., Crim., 27.

bringing of a charge, and that such charge was false and malicious.

It appears to me that, if a man, especially one interested in the matter, or having a certain official responsibility (and the prisoner is both), says to a police-officer, "A tells me "that X has committed a certain offence, and "B and C confirm the statement, and I "accordingly suspect X," and follows up that statement by an application to have X's house searched, he has, in truth, preferred a charge against X. The prisoner did all this.

If this were not so, an artful mischief-maker might easily bring innocent persons into trouble, and avoid all unpleasant consequences to himself.

The Judge finds, moreover, that there was ill-feeling between the prisoner and the persons thus falsely accused, and consequently that he entered with alacrity into the malicious prosecution of which the idea is supposed to have originated with the ticcadar of the village, the prisoner being the putwary.

I would not disturb the conviction or sentence.

The 12th December 1872.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Act XXV. of 1861, Section 62—Obstruction—Private dispute.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge.

Nilkomul Mookhopadhya

versus

Anund Chunder Lushkur.

Section 62 of the Code of Criminal Procedure does not apply to a private dispute between two parties relative to a path.

Reference.—THE Officiating Magistrate appears to me to have taken a mistaken and mischievous view of the intent and scope of Section 62, Criminal Procedure Code, and of his powers thereunder.

The case relates to what is admittedly a private path. One Brindabun Chunder Chuckerbutty owns the land, and a few years ago he metalled part of it. For the last four years Nilkomul Mookhopadhya has occupied a house which adjoins the path, and he has used it as a means of communication with the high road. Latterly Brindabun Chunder Chuckerbutty has run up a shed which infringes on the path to the extent of a cubit, and by means of his servants, Anund Chunder Lushkur and Prosonno Kumar Kanjobolly, has removed some of the brickwork of the path. Nilkomul Mookhopadhya complained of this, and the Officiating Magistrate deputed Deputy Magistrate Okhoy Koomar Sen to make a local enquiry. From his report, which forms part of the record, it will be seen, 1st, that he considers the path a private path; 2nd, that Brindabun Chunder Chuckerbutty is entitled to the material of which it is composed; and 3rd, that Nilkomul Mookhopadhya has a prescriptive right of way over the path. Without going further into the matter, but acting entirely on this report, the Officiating Magistrate, under Section 62, Criminal Procedure Code, directed Brindabun Chunder Chuckerbutty to pull down the shed which infringed upon the path, and fined Anund Chunder Lushkur and Prosonno Kumar Kanjobolly 5 rupees each for having committed the offence of mischief in removing some of the bricks in the path.

I think the High Court will agree with me that this was a case which ought not to have been tried under Section 62, Criminal Procedure Code, at all. The moment it was clear that the dispute was a private one between two parties relative to a path, they should have been left to settle it by reference to the proper Court. The obstruction complained of was no cause of public danger, and called for no exercise of exceptional power on the part of the Magistrate. If the Officiating Magistrate is to interfere in every private quarrel, because he thinks justice will be more speedily administered by himself than by the ordinary Courts, there is no knowing to what lengths he may not carry his powers under Section 62. If this case had been taken up under Section 320, Criminal Procedure Code, there might have been some reason for determining authoritatively whether a right of way existed or not; but the fact is, whether a right of way exists or not, Brindabun Chunder Chuckerbutty has never closed the way. He has only slightly reduced the breadth of an already broad path. There was really, therefore, no cause for the Officiating Magistrate to interfere at all. On what ground the two servants of Brindabun Chunder Chuckerbutty have been punished for removing some of the bricks, I am at a loss to conceive. Even the Deputy Magistrate who made the local enquiry considered that Brindabun Chunder Chucker-

butty had a right to do this. The removal of the bricks cannot be said to have caused wrongful loss or damage to the public or to any person. They were admittedly the private property of Brindabun Chunder Chuckrbutty, and Nilkomul Mookhopadhya was in no way legally entitled to them. I had hoped that the Officiating Magistrate, when he was directed by this Court to stay the execution of his order under Section 62, would have withdrawn it altogether as being beyond his jurisdiction; but as he has failed to do so, I am compelled to refer it to the High Court for orders. I have, therefore, to solicit the High Court to set aside the order directing the removal of the shed from the edge of the path, and to remit the fines levied on Anund Chunder Lushkur and Prosonno Kumar Kanjobolly on account of their removal of their master's bricks from the path.

Judgment of the High Court.

Jackson, J.—We are of opinion that the proceedings of the Officiating Magistrate in this case were quite unwarranted by law; that Section 62, Code of Criminal Procedure, did not apply to the case; and that the offence of "mischief" was not committed by Anund Chunder Lushkur and Prosonno Kumar Kanjobolly.

The orders of the Officiating Magistrate are therefore quashed; and the fines inflicted, if they have been levied, are to be repaid.

The 17th December 1872.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Act V. of 1861, Section 29—Police-officer—Search of house—Stolen property.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Gya.

The Queen

versus

Bolaki Lall, *Applicant.*

Baboo Boodh Sein Singh and *Moonshee Mahomed Yousuff* for the Applicant.

Mere rashness or negligence on the part of a police-officer, before ordering the search of a man's house for stolen property, does not constitute an offence amounting to violation of duty under Section 29, Act V. of 1861. The violation there intended must be wilful, intentional violation of some clear duty, or other.

Reference—THE Court will observe that the petitioner, Bolaki Lall, a Sub-Inspector of Police in this district, has been convicted by the Joint Magistrate of violation of duty, and sentenced under the provisions of Section 29 of the Police Code (V. of 1861) to suffer one month's rigorous imprisonment. The violation of duty which the petitioner has been found to have committed is said to have consisted in searching a house without reasonable and probable grounds for such search.

It appears to me that the order of the Joint Magistrate has been passed under a misapprehension both of the law of search and of the Act cited in the judgment.

The law which empowers police-officers to search for stolen and other property is contained in Section 142 of the Criminal Procedure Code; and, according to the wording of that Section, all that is necessary to make it lawful for an officer in charge of a police-station to search for such property is that he should consider the production of it essential to the conduct of an enquiry into an offence which he is authorized to investigate. None of the conditions herein specified were wanting in the case under consideration. The petitioner was an officer in charge of a police-station (a Sub-Inspector); he was conducting an enquiry into a case of theft which he was authorized to do; and he was undoubtedly justified in considering the production of the stolen articles essential to the conduct of that enquiry: consequently under the law he was authorized to search for them in any house or place within the limits of his station.

But the Joint Magistrate appears to hold that the petitioner had no reasonable ground for believing that the property sought for would be found in the particular house which he searched, and that consequently he committed a breach of duty in causing the search to be made. Upon this point I would remark that it does not appear that the petitioner searched the house in question of his own motion. On the contrary, there is evidence in the record to show that he did so at the request of others, who declared themselves to have reason to believe that the property might be found there. I cannot think that, under these circumstances, the officer committed any such violation of duty as to render himself liable to the penalties prescribed in Section 29, Act V. of 1861. It may be that there was no really good ground for the belief that the missing property was in that house, and in such a case the

proprietor has always a remedy for the injury done to him by a search in a civil action in which both the parties who instigated the search and the officer who made it might be cast in heavy damages if they failed to show some reasonable foundation for their proceedings. But a criminal prosecution against the officer alone is a very different matter, and it seems to me that the petitioner has done nothing to render himself liable to one. There is certainly nothing in the Act cited by the Joint Magistrate which can be construed as declaring directly or indirectly that a police-officer shall be held to have committed a violation of duty if he shall be unable to show that, before he searched for stolen property in any particular place, he had good reasons to believe it would be found there; and, in the absence of any such provision, it appears to me that the conviction under that Act is bad, and ought to be quashed.

As it is not improbable that some time may elapse before the receipt of orders upon this reference, during which time the petitioner would be continuing to undergo a disgraceful punishment which, in my opinion, he has not deserved, I have taken it upon myself to direct his release upon bail pending the arrival of the Court's orders.

I cannot conclude without recording my opinion that the evidence of the witnesses and the proceedings of the Joint Magistrate have been recorded in a much less careful and complete manner than was desirable.

Judgment of the High Court.

Jackson, J.—In this case it is not necessary to trouble the vakeel who appears in support of the view taken by the Sessions Judge. I concur in the view which the Sessions Judge has taken. All that is made out by the evidence, or found by the Joint Magistrate who convicted Bolaki Lall, is that, upon the request of a person whose property had been stolen, and upon some vague information that the complainant in this case, named Nujeeboollah, was a person who associated with thieves, and habitually received stolen property, Bolaki Lall, who was the Sub-Inspector of Police in charge of the police-station, searched Nujeeboollah's house.

The Joint Magistrate observes that it is essential, before a police-officer orders the search of a man's premises, that there should be sufficient and reasonable cause for making such search. That cause he holds to be wanting in the present case, and he, therefore, considers Bolaki Lall to have been guilty of violation of duty such as is contemplated by Section 29, Act V. of 1861, and accordingly convicts him under that Section, and sentences him to rigorous imprisonment for one month.

It is, no doubt, necessary that a police-officer, before ordering the search of a man's house for stolen property, should take care to have reasonable and sufficient ground for his proceedings; for, if he does not, he is liable to be called upon to justify his acts in a suit brought against him by the injured party, and may have, and properly have, to pay damages. This, it seems to me, is not a case in which mere rashness or negligence would constitute an offence amounting to violation of duty mentioned in Section 29. The violation there intended must be wilful, intentional violation of some clear duty, or other. The Section speaks of "any violation "of duty, or wilful breach or neglect of any "rule or regulation, or lawful order made by "competent authority." I do not understand by the arrangement of these words that the violation of duty contemplated can be anything otherwise than wilful or intentional. I think it is clear that the Legislature did not intend to affix so serious a penalty as three months' imprisonment, with or without hard labor, to a mere mistake committed by a police-officer (for in this case *mala fides* is not imputed) in the execution of his duty. The view that I take is in accordance with a decision reported in 8 Bengal Law Reports, Appendix, p. 60, in the case of Queen v. Radhoo Singh,* before Bayley and Markby, JJ. I think the conviction is not warranted by law, and must be set aside.

Markby, J.—I am of the same opinion.

The 15th January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Mookhtar—Acting—Act XX. of 1865, Section 5.

(Miscellaneous Case.)

Fuzzle Ali, *Petitioner.*

Mr. J. S. Rochfort for the Petitioner.

The word "act" in Section 5 of the Pleaders' and Mookhtars' Act, XX. of 1865, means the doing something as the agent of the principal party which shall be recognized or taken notice of by the Court as the act of that principal. There is nothing in the words of the Act or in its spirit to prevent a person as private agent from going between the prisoner or the duly authorized vakeel upon whom the real responsibility of the defence rests.

* 17 W. R., Crim., 34.

Phear, J.—In this case the petitioner has been fined by the Sessions Judge for having practised as a mookhtar in the Sessions Court without having previously obtained a properly stamped certificate authorizing him so to practise. The Judge says: "In the case of the Queen *vs.* Buzurgcha Kalu and others, tried at the late Sessions on the 22nd July, I noticed Fuzzle Ali instructing the Vakeel, Baboo Kamala Kanth Sein, who was engaged for the defence. From the statement marked A made by him on that day, and from the petition put in by him to-day and marked B, it is quite clear that he is a practising mookhtar, and not the employé of a single individual, who, as himself conversant with the facts, was assisting his master in his trouble by communicating them to the vakeel. It is admitted that his knowledge was derived second hand; that he lives and practises here in Chittagong. And it is contended that to instruct a vakeel, stand behind him during the trial, suggest questions, and otherwise take an active part in the management of the defence, does not amount to practising as a mookhtar in the Court of Session. I am of opinion that such acts do amount to 'practising as a mookhtar.'

"Fuzzle Ali received no permission from the Court to appear for the prisoner. He holds a certificate on an eight-rupee stamp under Clause (G), Section 10, Act XX. of 1865. To enable him to practise in the District Court, *i.e.*, Court of Session, he should hold a sixteen-rupee stamped certificate under Clause (F). He is liable to a fine not exceeding 16 × 10 = 160 rupees under Section 13 of the Act, but I shall limit the fine to ten times the difference."

This matter has been brought before us under Section 42 of Act XX. of 1865, the Act already quoted, which says that "Every order for imposing a fine which shall be passed under this Act shall be subject to revision by the High Court if the order shall have been passed by a Court subordinate to the High Court." * * *

It seems to me that the order of the Judge ought not to be sustained. The only evidence of "practising" which the Judge has relied upon, in fact had before him, was merely evidence of the fact of Fuzzle Ali's having stood behind the vakeel during the Sessions trial, and suggested to him questions, and otherwise taken an active part in the management of the defence during that time. It does not appear very precisely what it was which the learned Judge meant by saying, "otherwise taking an active part in the "management of the defence." But it is tolerably clear, I think, on the whole, that Fuzzle Ali was not in any way doing more than that which is involved in the words "assisting a person in a Criminal Court" used in Section 40, Act XX. of 1865, and this "assisting" I take to be something different from appearing or pleading or acting. The provisions of the Act with regard to *practising* as a pleader or mookhtar appear to be all included in Section 5 of the Act, which says that: "Except as hereinafter "provided, no person shall appear, plead, or "act as a pleader, or appear or act as a "mookhtar in any Court to which this Act "extends, unless he shall have been admitted "and enrolled, and shall be otherwise duly "qualified to practise as a pleader or as a "mookhtar, as the case may be, pursuant to "the provisions of this Act." * * *

Fuzzle Ali, according to the Judge's account, did not appear for the prisoner or plead for the prisoner, and he did not act for him, unless the standing behind the vakeel and suggesting questions amounted to acting within the meaning of Section 5 of this Act. It seems to me that it does not do so. I think that the word "act" there means the doing something as the agent of the principal party, which shall be recognized or taken notice of by the Court as the act of that principal; such, for instance, as filing a document. According to the finding of the learned Judge, Fuzzle Ali was not really doing more than conveying information from the prisoner, or on behalf of the prisoner, to the vakeel who was actually defending him. What that information was the Court had no cause to know, and nothing that Fuzzle Ali so said or indicated to the pleader would really bind his principal before the Court.

It appears also from the petition read to us to day that there was an *Am-mookhtar-namah* filed in this criminal case, giving authority to Fuzzle Ali to act as private agent of the prisoner: so that such agency-character as he might be assuming was, in truth, attributable to a special contract, and not to the ordinary retainer of a mookhtar of the Court. As I have already suggested, the part played by Fuzzle Ali on this occasion may have been such as would, had the prisoner been defending himself, have amounted to assisting him within the meaning of Section 40. But although he could not, under those circumstances, have assisted the prisoner with-

out leave of the Court, there is nothing, either in the words of the Act or in its spirit, as I understand it, to prevent him as private agent from going between the prisoner and the duly authorized vakeel upon whom the real responsibility of the defence rested.

On the whole, then, it seems to me that, upon the materials before us, there is not sufficient to uphold the conviction of the prisoner which the Judge has come to, namely, of having practised as a mookhtar in the Sessions Court without having previously obtained a properly stamped certificate. I think, therefore, that the order ought to be set aside, and the fine remitted.

The 15th January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Breach of the peace—Roobokaree—Act XXV. of 1861, Section 318.

(Miscellaneous Case.)

Kishoree Mohun Roy and others, *Petitioners.*

Baboo Doorga Mohun Dass for the Petitioners.

Under the provisions of Section 318 of the Code of Criminal Procedure, the Magistrate should specify the nature of the information received by him, and state the principal facts which, by the exercise of a judicial discretion, he derives therefrom, and which, in his judgment, constitute grounds for believing that a dispute concerning certain land exists, which is likely to induce a breach of the peace; and the roobokaree which Section 318 prescribes should plainly set out, without reference to any other documents at all, the actual facts which constituted the ground for such belief on the part of the Magistrate.

Case of Sutherland (18 W. R. 11) explained.

Phear, J.—I THINK that the application to have these proceedings quashed must be refused.

The petitioner bases his application upon four grounds, which may perhaps be conveniently grouped two and two together. The first ground is that "the proceeding "instituting the case under Section 318 being "not based on legal evidence, the whole "proceeding is void *ab initio.*" And the third, which I think may be coupled with this, is that "the Deputy Magistrate has "acted illegally in acting on the statements "of witnesses not examined on oath, and "whose examinations were never reduced "into writing."

I suppose that the record was sent for by the Division Bench mainly upon the ground of objection comprehended under these two heads, and that, inasmuch as an endeavour has been made to support this objection by reference to two judgments, which on former occasions it fell to me to deliver, I am bound now to say that more has been inferred from the words which I uttered on those two occasions than I intended to convey.

In the matter of the petitions of J. D. Sutherland,* which is reported in the 9th volume of the Bengal Law Reports, page 229, the present Chief Justice quotes portions of the two judgments which I have just referred to, and then says: "The words of the Section being that, when the Magistrate "shall be satisfied that a dispute likely to "induce a breach of the peace exists, he "shall record a proceeding stating the "grounds of his being so satisfied, the learned "Judge says, in the first case, that the Magis-"trate must adjudicate upon the matter, and "then he seems to have gone a step further, "and speaks of a judicial decision, whence it "has been inferred that the Magistrate must "take evidence, and proceed in the same way "as in an ordinary judicial enquiry. Now, I "must say that I am unable to agree in this "view of the requirements of Section 318."

That view, thus obtained by inference from my words, is not my view. I concur with the Chief Justice when he goes on to say: "All that it (that is, the Section) requires, in "my opinion, is that the Magistrate is to be "satisfied that a dispute exists, and he is to "record the grounds of his being so satisfied. "There is nothing which defines upon what "grounds he shall be satisfied, or limits him "to being satisfied by evidence taken before "him. It is properly provided that he shall "state the grounds of his being satisfied "in order that the revising Court may be "able to see that he has not arbitrarily insti-"tuted proceedings of this kind."

In my opinion, it is simply necessary that the roobokaree which the Section 318 prescribes should plainly state the grounds of the Magistrate's being satisfied that a dispute likely to induce a breach of the peace exists concerning certain specified land, &c., within his jurisdiction. In order that any such ground as this should be plainly apparent, information must be referred to, and facts must be stated by the Magistrate as facts believed to exist by him; and this information and these facts must, I think, be such as to afford on the face of the roobokaree rational grounds for the belief that a dispute likely to induce a breach of the peace existed with regard to certain specified property; and

* 18 W. R., Crim., 11.

t will be found, I believe, that, in the two ases where the judgments referred to were iven by me, there was not only no roobokaree xhibiting reasonably sufficient grounds, but think, I may say, no grounds whatever ere given.

In arriving at an opinion with regard to he facts which the Magistrate in his roobokaree gives as the grounds of his belief, the Iagistrate must, I apprehend, form his judgnent by the exercise of a judicial discretion ipon some sort of materials. The Criminal Procedure Code does not limit those materials o evidence given on oath, and I know iothing which should restrict them excepting his, namely, that, when mentioned in the oobokaree, they must appear to be materials uch as would, in their nature, justify a judiial officer in relying upon them.

It appears to me. then, shortly, that, under he provisions of Section 318, the Magistrate hould specify the nature of the information eceived by him, and state the principal facts hich, by the exercise of a judicial discretion, e derives therefrom, and which, in his judgnent, constitute grounds for believing that a lispute concerning certain land exists, which is ikely to induce a breach of the peace, if he oes not take measures under this Section to revent that consequence. Unless he is in a osition in this way to present clear and ational grounds, capable of being estimated ccording to their merits on the mere statenent of them, in my opinion he has no legal oundation on which to base his investigation *inter partes* relative to possession.

The second group of objections in this ase is, first, that, "the plea of your petitioners having been that they were in possession of the disputed lands jointly with the other party, the Deputy Magistrate had no jurisdiction to proceed with the case under that Section, but should have proceeded under Circular Order No. 10, dated the 16th April 1863. And, secondly, the plea of your petitioners' joint possession has not been enquired into. The thakbust field-book shows conclusively the joint nature of your petitioners' possession."

It seems to me that both these particular bjections are fully disposed of by the finding f the Magistrate that the opposite party ere, in fact, in sole possession of the land. hat is the very matter of fact which the ct obliged him to enquire into, and gave him uthority to determine. The words of the ection are: "Such Magistrate or other officer as aforesaid shall, without reference "to the merits of the claims of any party to "a right of possession, proceed to enquire "which party is in possession of the subject "of dispute, and, after satisfying himself on "that point, shall record a proceeding declar-"ing the party whom he may decide to be in "such possession, to be entitled to retain "possession until ousted by due course of "law, and forbidding all disturbance of pos-"session until such time."

Therefore, whatever were the pleas set up before him by the parties, it appears that he has duly enquired into the question of possession, and has come to the conclusion that the opposite party is the party in sole possession of the subject of dispute.

Another objection to the validity of these proceedings, and one which was not raised by the petitioner, has been discussed before the Court. It is to the effect that the roobokaree which the Magistrate returns to us does not plainly state the grounds upon which he was satisfied that a breach of the peace was likely to occur. This objection was raised by the Court itself during the argument; and if the materials which have come before the Court on this occasion were, in fact, the whole of the proceedings, it is probable that the objection would have appeared to be a good one. But the roobokaree which the Magistrate has sent up does refer specifically to certain documents and depositions which the Magistrate states were treated by him as affording ground for action under Section 318. I cannot say whether these, if taken and read with the roobokaree itself, would or would not disclose good grounds for the Magistrate's being satisfied as he was bound to be satisfied; and inasmuch as the petitioner did not himself take this objection to the sufficiency of the proceedings, I think we ought not now to give effect to it. We ought rather, perhaps, to assume that the reason why this particular objection was not made is that, if all the materials properly belonging to this matter were before the Court, it could not, strictly speaking, be sustained.

I think it is unfortunate, however, that the roobokaree, which in some respects is more full than the roobokarees in these cases generally are, did not itself plainly set out, without reference to any other documents at all, the actual facts which constituted the ground for the Magistrate's being satisfied that a dispute likely to induce a breach of the peace existed between the parties.

We refuse to interfere with the Magistrate's order.

The 17th January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

(Miscellaneous Case.)

Ramkishore Sein, *Petitioner.*

Mr. J. T. Woodroffe and *Baboo Ishur Chunder Chuckerbutty* for Petitioner.

Baboo Juggodanund Mookerjee, Government Pleader, for Prosecution.

Per Phear, J.—In order to lay a sufficient foundation for the issue of a proclamation under Section 183, and the accompanying order of attachment under Section 184, Code of Criminal Procedure, the Magistrate must, upon some sufficient materials, find judicially that the person against whom the proclamation is to be issued has absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him.

Per Phear, J.—The period of 30 days, which is prescribed in Section 183 as the minimum period within which the person is to be required by the proclamation to appear, was intended by the Legislature to run from the date on which the publication, in the mode prescribed by the same Section, should be effected.

Per Phear, J.—The declaration of forfeiture, directed to be made in Section 184, if not made before the person affected by the proclamation has come in, or has been brought in, ought not to be made at all.

Phear, J.—It appears to me that the matter brought before us on this petition has been a most unfortunate one at every stage. * * * * *

In April 1871, the Magistrate of Maldah, after taking the deposition of one Heera Lall Dass, issued a warrant of arrest, upon a charge of forgery, against five persons, including Ramkishore Sein, the present petitioner. This warrant was infructuous; and on the 8th November, six months afterwards, the police-officer charged with its execution made a deposition before the Magistrate, upon which the Magistrate passed this order: "It is ordered under Sections 183 "and 184 of Act VIII. of 1869 that pro-"clamation be issued, calling on these five "persons above mentioned to appear in my "Court on or before 18th December 1871, "and that all their moveable and immoveable "property be attached under Section 184."

On the same day a proclamation was drawn up by the mohurrir of the Court, and signed by the Magistrate, requiring Ramkishore Sein, amongst others, to appear in the Magistrate's Court on the 10th December.

There is an endorsement on the proclamation to this effect: "This proclamation is "forwarded to the police-officer of Division "Khurba for service." This is dated the 10th November 1871, and signed Kally Dass Biswas, Court Sub-Inspector.

Then comes a second endorsement: "Forwarded to Head Constable Tincoury "Khan for service. Dated 13th November "1871. Signed Madhub Chunder Sanyal, "Head Constable, Station Khurba."

A third endorsement is: "Received in "Mofussil on the 14th November 1871.

"(Sd.) A. Woodeen,

"*Head Constable.*"

A fourth endorsement runs thus:—

"Honored Sir,—On receipt of this pro-"clamation, your humble servant proceeded "to the spot, affixed the duplicate at a "conspicuous place, and informed the heirs "of the defendants. The three kyfeuts of "the neighbours regarding the same are "herewith submitted. Dated the 23rd No-"vember 1871. Signed by his obedient ser-"vant, Tincoury Khan, Head Constable, "Station Khurba."

The fifth, and I believe last, endorsement is:—

"Honored Sir,—Begs to submit the "accompanying papers sent in by Head "Constable Tincoury Khan. Signed obedient "servant, Madhub Chunder Sanyal, Head "Constable."

This somewhat remarkable set of endorsements constitutes all the existing evidence relative to the fact of publication of the proclamation. It refers, as far as I can gather, to publication at Khurba only; and is silent as to any sort of publication at Raipore, the place where the petitioner resides, and the place to which the proclamation itself describes him as belonging.

The petitioner did not surrender himself before the 10th December. But he did, in fact, surrender himself, together with two others of the five accused persons, on the 19th December. He was then committed to "hajut." Afterwards, from time to time, the petitioner was brought before the Magistrate, and as often remanded, although no evidence had been taken since the date on which the Magistrate originally issued the warrant of arrest. And this continued until the 27th April 1872, when the petitioner and the two other prisoners applied to the High Court for relief. A Division Bench, consisting of the Chief Justice and Mr. Justice Ainslie, heard the matter, and the Chief Justice, in giving judgment, stated: "There was not any evi-

dence taken which could be made the foundation of a charge; and the Magistrate appears to have been influenced in the course which he took by the expectation that, after some time and by dint of enquiry, some evidence might be obtained."

The High Court, therefore, made the order that the last order of remand, namely, that of the 26th February, should be annulled.

The consequence of this order was, I believe, that the petitioner and the others were discharged on the 18th May.

In the July following, the petitioner applied to the Magistrate to have the order of attachment, which had been put upon his property simultaneously with the issue of the proclamation on the 8th November, removed. In that application the Magistrate said:—

"Under all these circumstances, I see no reason why the provision of the law as to this attached property being at the disposal of Government should not be carried out, and I order accordingly."

It thus appears that, while the petitioner is a free man with no charge, in fact, hanging over his head, simply because, as the Chief Justice phrased it, no evidence has been found to support the original charge made against him, yet as much of his property as could be got at by the Magistrate is by an order passed by the Magistrate since the petitioner's own release forfeited to Government. It seems to me that this, certainly, is a startling state of things, to say the least, and very strong grounds are needed in my judgment to prove that it is right.

The Government pleader has urged upon us that we should not at this stage interfere in the matter, because it is still open to the petitioner to apply under Section 185 of the Criminal Procedure Code to have the property restored to him. But, as far as I understand the proceedings which have been taken, the application which he made in July last to the Magistrate was, in fact, an application to have the benefit of the provisions of that very Section, and that application has been refused.

Now, on turning back to the commencement of these proceedings, I may take it as being at this time beyond contest that, in order to lay a sufficient foundation for the issue of proclamation under Section 183, and the accompanying order of attachment under Section 184, the Magistrate must, upon some sufficient materials, find judicially (that is, by the exercise of judicial discretion applied to the consideration of that material) that the person against whom the proclamation is to be issued has absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him. But in this case, according to the record which has been sent up to us, the Magistrate ordered the proclamation to issue without having previously come to any such finding at all. We have in the official copy of documents laid before us merely a deposition of a certain Mohima Chunder Ghose, Court Inspector, followed immediately on the same paper by this order: "It is ordered, under Sections "183 and 184 of Act VIII. of 1869, that proclamation be issued, calling on these five persons above mentioned" (that is, I suppose, mentioned in the deposition) "to appear in my "Court or before," &c. It was distinctly held by Mr. Justice Norman in the case which is reported in page 73, Criminal Rulings, of the 6th Volume of the Weekly Reporter, that, "before the Magistrate can issue the written "proclamation under Section 183, and order "the attachment of the property of an accused "party who cannot be found, *he must be "satisfied that such person is absconding "or concealing himself for the purpose of "avoiding the service of the warrant.* The "Magistrate should have recorded in his proceedings whether or not he was so satisfied."

I entirely take this view, and I think that, until the Magistrate had judicially found as a fact upon sufficient information that the person against whom the proclamation is to issue had absconded, or concealed himself for the purpose of avoiding apprehension under the warrant, he had no authority to issue that proclamation. Not only is it the case that no such finding appears to have been come to by the Magistrate so far as this record speaks, but it seems to me that the deposition of the Court Inspector, if stretched to the utmost, could not possibly in reason be made the ground of a conclusion that Ramkishore Sein was, in fact, evading the service of the warrant. And the recital with which the proclamation commences, assuming that it might properly be taken as evidence of the formal finding of the Magistrate, does not carry the matter further, for it merely says: "Whereas it has appeared from the deposition on oath of the Head Constable, Baboo "Mohima Chunder, that the above-named "defendants have absconded, this proclamation is issued," &c., and it stops short of stating that the persons named had absconded for the purpose of evading the Magistrate's warrant.

Thus, it appears to me that in this case the whole foundation for the attachment and

confiscation of the property fails. It is, therefore, not, strictly speaking, necessary that I should express an opinion on the other points which have been mooted in this application. I think, however, it is right that I should throw out, as my own opinion, that the period of 30 days, which is prescribed in Section 183 as the minimum period within which the person is to be required by the proclamation to appear, was intended by the Legislature to run from the date on which the application in the mode prescribed by the same Section should be effected, namely, by reading the proclamation publicly in some conspicuous place of the town or village in which such person usually resides, and by affixing it on some conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village.

If this view be correct, then, inasmuch as we have certainly no evidence at all in this case as to when the proclamation was read in the town or village of Raipore, where, according to the proclamation itself, the petitioner usually resided, or when it was affixed on some conspicuous part of his ordinary place of abode, it would be impossible for us to infer that he did not, by coming in on the 19th December, come in within 30 days from the date of publication of the proclamation, if duly effected in that manner, *i.e.*, within the 30 days as limited by the Act. The Magistrate seems to think that the 30 days should be counted from the date of *issuing* the proclamation. If this were so, then, as Mr. Woodroffe very rightly pointed out, the proclamation might get into the hands of some Subordinate Court Officer, or, even going further than this, into the hands of some local officer for the purpose of being published according to the terms of Section 183, and yet might not, in fact, become published at all within the period of 30 days. It is manifest that even such a delay as has undoubtedly occurred in this case, namely, the delay involved in the fact that the proclamation was not published anywhere, according to the endorsed returns, until some day between the 14th and 23rd November, might be a very serious diminution of the period of 30 days, so far as regards the opportunity for learning of the proclamation and returning, which the Legislature professed to afford to the absconding person.

I will further add that the inclination of my opinion is that the declaration of forfeiture directed to be made in Section 184 was intended to be in furtherance of a matter of procedure, and not simply as a mode of punishment for contempt of process; and in this view I think that, if it is not made before the person affected by the proclamation has come in, or has been brought in, it ought not to be made at all; because by that time its purpose has been effected, though even possibly by other means than that of the process which was evaded. * * * *

What is the meaning of the proceeding by which the Magistrate bound the petitioner, on the occasion of his making this application in his own behalf, by recognizance to appear from time to time, I have not yet been able to understand. On the face of it the recognizance does not bind him to meet any criminal charge, and the Government pleader is unable to say whether, in fact, at that time any criminal charge had been preferred against him or not. The papers which are before us ought to contain all that is pending in the Magistrate's Court upon this matter, and they do not disclose a trace of any other criminal charge having been made against the petitioner than that which was made in April 1871, and which has fallen to the ground in consequence of the order passed by this Court in April 1872, and the petitioner's subsequent release from custody.

It seems to me very clear, however, that the attachment and order under Section 184 have been made without sufficient ground in law, and must be set aside. * * * *

Ainslie, J.—I think that the order of forfeiture and attachment of the property in this case ought to be set aside on the ground that it has not been shown that the petitioner failed to attend within 30 days of the service of the proclamation issued by the Magistrate under Section 183. The procedure laid down in Section 183—by publicly reading the proclamation in some conspicuous place of the town or village in which the accused person usually resides, and by affixing it on a conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village—seems to me to indicate that it was the intention of the Legislature that the accused person should have the means of deriving information through his family or friends or in some other indirect way, when the warrant or the direct order to attend the Court cannot be served upon him; and that the Legislature has distinctly determined what shall be considered a sufficient time to allow such indirect notice to reach him. and

r him to attend the Court in consequence that notice, that time being 30 days.

Unless this was the intention of the Legislure, it may very well happen that the cused person should really have no reason suppose that any proclamation was being ued: In this very case, I find that from e issue of the warrant to the issue of the roclamation, a very long period expired. the proclamation had followed immediate- on the return to the warrant, to the effect at the accused person had absconded, it ight be taken as one continuing proceeding r securing the attendance of the accused. t when a long interval is allowed to pse between the return to the warrant and e issue of the proclamation, I, for my own rt, cannot see how the accused person, o may have gone to a considerable dis- ce at that time, is to be supposed to know t the proceedings have suddenly been ived against him. In this case, the peti- ner surrendered on the 19th December, d we do not know on what date between e 14th and the 23rd November the service the proclamation was effected; and I do t think that we should be justified in as- ming that the petitioner was not within 30 ys of the issue of the proclamation when e put in his appearance on the 19th De- mber. It must be understood that I have intention to express dissent from any of e remarks made by my learned brother in is case, but I think it is quite sufficient r me to put the order we propose to make on the ground which I have indicated.

The 21st January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

ocedure—Insanity—Jury—Act XXV. of 1861, Section 232—Act X. of 1872, Section 425.

The Queen

versus

Bheekoo Kalwar *alias* Bhek Sha.

HELD, having regard to the provisions of Sections 232 d 425, Code of Criminal Procedure, that, where an used person at his trial appears to the Sessions Judge be of unsound mind, the trial of the issue of insanity art of the trial of the accused, and ought to be tried the Jury, and not by the Sessions Judge personally.

Phear, J.—IN this case the prisoner has en convicted of murder, and sentenced to death, and the record has come before us in due course for the confirmation of that sentence.

The Judge reports that, under Section 271 of the Criminal Procedure Code, he enquired of the accused whether he wished to appeal, and he signified his intention of not doing so.

On referring to the record, we find at the outset a statement written by the Judge to this effect: "The demeanour of the accused, "when called on to plead to the charges, was "so peculiar that I entertained doubts as to "his sanity. I, therefore, thought it neces- "sary to try the question of the accused's "unsoundness of mind."

The Judge then states that he took the evidence of the Civil Surgeon, and concludes in these words:—

"On the evidence of the Civil Surgeon, I "cannot hesitate to pronounce that the "accused is of sound mind and capable of "making his defence."

Thereupon the trial proceeded before the Jury. Section 425 of the Criminal Procedure Code enacts that, "if any person committed "for trial before a Court of Session shall, at "his trial, appear to the Court to be of un- "sound mind and incapable of making his "defence, the Court shall, *in the first* "*instance*, try the fact of such unsoundness "of mind; and, if satisfied of the fact, shall "give a special judgment that the accused "person is of unsound mind and incapable of "making his defence; and thereupon the "trial shall be postponed."

It appears to us, from the use of the words "*in the first instance*," clear that the Legislature intended the trial of this issue of insanity to be considered as part of the trial of the accused person before the Court; and then we find, upon referring back to Section 232, that "all trials before the Court of Ses- "sion shall be either by Jury, or conducted "with the aid of two or more assessors."

Here, the trial was to be by a Jury; and reading the two Sections together, we think that the preliminary issue which the Sessions Judge tried ought to have been tried by the Jury, and not by himself personally.

On that ground we think that the whole of the trial has been vitiated, and that the conviction and sentence must be set aside, and a new trial directed.

The 23rd January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Approver — Accomplice — Corroboration — Evidence—Act I. of 1872, Section 30.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of murder, &c.

The Queen

versus

Mohesh Biswas and others, *Appellants.*

Messrs. Munmohun Ghose and *J. S. Rochfort* for the Appellants.

The corroboration which is needed in order to make the testimony of an approver-witness trustworthy should be corroboration derived from evidence which is independent of accomplices, and not vitiated by the accomplice-character of the witness, and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed, and participated in the acts of commission. The statement must not merely be generally true, but true in the particular points which affect the persons accused.

Under Section 30 of the new Evidence Act, I. of 1872, the statement of fact made by a prisoner which amounts to a confession of guilt on his part may be taken into consideration so far, and so far only, as that particular statement of fact itself extends, against the other prisoners who are being tried, as well as himself, for the offence which is thus confessed.

Phear, J.—In this case four persons, Mohesh Biswas, Prilhad Dass, Goggun Sikdar, and Dwarik Joardar, have been convicted of murdering one Tincowri Karigur, and of making away with his dead body; and a fifth person, Ram Indro Dass, has been found guilty of abetting the four first-named persons in the commission of the offence of murder.

All five have been sentenced to transportation for life.

Putting on one side for a moment the testimony of Soorut Ali and the statement made by Ram Indro Dass, one of the convicted persons, the evidence in the case is very slight, and may be shortly stated as follows:—

Oojul Karigur says that Tincowri Karigur was his brother; that on a Thursday, the 21st or 22nd of Assar, Tincowri slept in the south verandah of his house, together with one Lobun Karigur, his cousin, while he, Oojul, slept inside the house. Next morning, on awaking, he found neither Tincowri nor Lobun were there. Search was made for him during the day, and he was not found. Four days afterwards, having heard that Khoda Bux and Fuzzoollah had found a skull in an indigo-field, Oojul and his mother went and asked those persons about it the same night (that is Monday night); and the next morning, Tuesday, Oojul says, he went with the chowkeedar, and found the skull in the indigo-field, and knew it to be the skull of Tincowri, his brother, by the overlapping of the teeth.

A skull was produced in the Sessions Court, and he says this is his skull. But it appears that, at the time when he so recognized it in Court, the overlapping teeth, or at any rate one of them, was absent. Mr. Justice Ainslie corrects me. All the teeth had come out, and one of the supposed overlapping teeth was actually lost.

Oojul then says that he started off to get the Darogah of the Police, was several days in search of him, and did not find him till Thursday. On Friday, he says, the Darogah came to the village, and made an investigation. He further states that, in the place where the skull was found, there were marks of blood, and also that the skull, when found, had flesh on it, and exhibited marks as if blows had been inflicted.

Lobun Karigur states that, on one Thursday night in Assar, he and Tincowri Karigur were sleeping in the verandah of his cousin's west house. This does not precisely accord with Oojul's statement, unless Oojul meant to say that it was in the south verandah of the west house that Lobun and his brother were sleeping. Lobun proceeds to say that at about midnight a man came and called Tincowri to play. "I saw the "man, but I can't recognize him. * * * "When I got up in the morning, Tincowri "was not there, and I went home. Tincowri "said nothing when he went away, neither "to me nor to the man who called him."

Photo Bewah, the mother of Tincowri, says that she recognizes the skull which was in Court by the front tooth. But she did not state what was the mark or singularity by which she recognized it. She then went on to say: "On a Thursday he was sleeping in the south verandah with Lobun: I knew nothing till the next day. Four days after, that is, Monday, Khoda Bux said that he had found a fresh skull, and I and Oojul went out and found it. There were marks of blows upon it. There were marks of blood on the grass. Oojul then called the chowkeedar, and took away the skull."

Khoda Bux stated the circumstances under which he found the skull. These

were more fully given also by Fuzzoollah, who said: "One Monday in Assar, I put the cattle to eat grass in the indigo on Ambar Sheikh's land. At one dund of the day remaining, Khoda Bux called me to look at the skull. There was a little flesh on it and blood, and it smelt very bad; there was blood on the grass by the side of it. I had not then heard of the murder. The burning-ghat is about 10 rusees from the place where the skull was found.

Kayim Sheikh says: "I knew Tincowri," though I may observe he is not asked what were his terms of intimacy with Tincowri; what his acquaintance with him was; he appears to have been once living in the same village no doubt; what I mean is, he gives no particular reason why he, of all others, should be called to speak to this particular personal peculiarity. He says: "I knew "Tincowri. One of his teeth in front over-"lapped the other." He gives no more particular description than this: "When I "first saw this skull" (that is, the skull in Court), "one tooth overlapped the other in "that way, and I believe that the skull is "Tincowri's."

There is but one more witness, *viz.*, Hurrish Chunder Chatterjee, Sub-Inspector of Police, who says: "On the night of the 11th July (which was a Thursday), Oojul Karigur came to me, and told me of his brother's disappearance. I took down his statement at the time. There it is marked *J* in Court. The next day I went to Srirampore, and found the skull in Oojul's house. His mother or he brought it. They said they knew it by the teeth. I saw that one front tooth overlapped the other. I went to the place where it was said to have been found. I saw cow-dung there, and the grass was red—I can't say whether from blood or not. I searched Mohesh's house, and found the dao with marks of blood upon it."

This is the whole of the evidence, with the exception which I first made; and it is at once remarkable that, until we come to the last passage which I have just now recited, there is not a single word or fact which implicates any one of the five prisoners in the commission of any offence or act whatever; and I will go further than this, and say that this evidence leaves it certainly doubtful whether even any trace of the missing man has yet been discovered. The identification of the skull is made by the three witnesses, Oojul Karigur, Photo Bewah, and Kayim Sheikh, by reference to features which are no longer to be found upon it. It therefore becomes of some importance to see what has been the history of this skull, and at what period of the case the distinguishing tooth disappeared from it. For this purpose the document (J) which the Sub-Inspector Hurrish Chunder Chatterjee put in is, I think, valuable. We have had it translated, and it runs as follows:—

"Information lodged at the police by Oojul Karigur, dated the 11th July 1872, corresponding with 28th Assar 1279.

"Oojul Karigur, son of Banook Karigur, aged 30 years, inhabitant of Srirampore, Pergunnah Mahmudshie, the property of the zemindar Baboo Gooroodass Roy, made his appearance at 10 o'clock to-night in the bazar of Bhotook, accompanied by Anund Sheikh, a chowkeedar of the said village, * * * and made the following statement:—

"That on Thursday last, that is, on the night of the 21st Assar, I slept in the room standing on the western side of my house after taking my meal; that my younger brother, Tincowri Karigur, and my cousin (father's sister's son) Lobun Karigur, of Howrah, slept together in the same bed in a thatch lying to the southern wall of the said room; that my mother and my brother, Bhomra Karigur, and sister, Panchee Chookree, were asleep in the room standing on the southern side of the house; that nothing came to my knowledge during the night; but in the morning, when I rose from bed, I did not find my brother Tincowri in his bed; that I therefore asked my cousin, the aforesaid Lobun Karigur, who had been in the same bed with Tincowri, about the latter, and he replied that a man had come at 2 prohurs in the night, called out to Tincowri, and had gone away, accompanied by him. When I found that it was late in the morning, and yet my brother had not made his appearance, I went out of the house to search for him in the village, but I could not trace him out during the whole day and night, although I enquired about him at every house in the village. On the following day I enquired about my brother at the houses of our relations at Howrah, Bareepore, Kazimpore, &c., as well as in the neighbouring villages, that is, in the villages were there was a probability of his going, but I could not trace him out, and I therefore continued to search for him. In the evening of Monday last the "Tageedgeer" of the village, named Fuzzoollah, told me of his having seen a human head in the indigo-land lying to the north of the village. In the morning of Tuesday following, I proceeded to the aforesaid field, and found a

human head without nose, ears, eyes, hair, and mouth, but having only the teeth attached to the upper jaw and three marks on the skull of the head in three places like marks of wounds inflicted with some hacking weapon. The head was also fresh, and smell proceeded from it as that of a man who had recently met death by an accident. I took the head to be that of my brother Tincowri, removed it from the spot where it lay, and carried it to my house. When the head was shown to the neighbours and to my mother and the other inmates of my house, they all supposed that the head was that of my brother, *but we could not positively recognize the head, there being no distinguishing mark upon it.*"

Thus, it seems that, when the principal witness in the case first told his story to the police, and spoke of the finding of the skull, he, with the full knowledge of the fact that the skull at that time had the tooth in it, because he said so expressly, and after having apparently examined it with some closeness, because he says there were three marks on the skull, he states distinctly that neither the mother nor any other members of the family positively recognized that it was the skull of his brother, because there was no distinguishing mark upon it.

The statement goes on to say: "I then put the head in an earthen pot (*handee*), and kept it in a room of the house. On Wednesday morning, I lodged information of the matter to the Naib and Peshkar of the cutcherry of the zemindar at Mokrampore. The Peshkar then visited our village, and desired me to go to the thannah with an itlahnamah, and to give *izhar* there. Accordingly, at 2 dundahs before sunset yesterday I proceeded to the thannah of Shoylak, but could not find any head-officer there. I, however, learnt from a man that you (Darogah) might be at the time either at Hurrish Koondoo or at Porahata. I passed the night in a village named Barooeparah. In the morning I came home, and then went to Porahata, accompanied by the chowkeedar of the village. When I arrived there, I learnt that you (Darogah) had returned to the thannah. Accordingly, I proceeded to the thannah to-day, but I learnt there that you were either at Foolharee or at Bhatore. I then went to Foolharee, but there learnt that you were at Bhatore. I have, therefore, come here, and make this statement. My brother Tincowri, about 2 months ago, was in love with the daughter of our neighbour Mohun Dass Kyburto. The indigo-field where the head was found is 6 or 7 rusees to the north of the house of the said Mohun Dass. I therefore suppose that, in some way or other, my brother met his death at the hands, either of the said Mohun Dass, his brother Seetul Dass, or his son Prilhad Dass; but I have not got certain information from any person, nor have I any positive knowledge as to these persons having murdered him."

I do not think that I need read any more of the statement for the present. The remainder consists of a series of questions put by the Darogah and answers given by Oojul Karigur. There is one answer, however, which is perhaps more important than the rest. To the question—"You say that you could not find your brother since Thursday last, why did you not earlier lodge information of the matter?"—the answer was that, "in the month of Bysack last, my brother Tincowri quarrelled with me, and left the house in an angry mood, and went to the house of my maternal uncle at Majeeparah, in Zillah Pubnah, and passed 6 or 7 days there, and then returned home; I therefore supposed that he had intentionally gone to any particular place, and omitted to lodge immediate information at the thannah." So that there is not apparently any *à-priori* improbability in this case that the missing man might have gone away on this occasion of his own accord, as he had done once before, without saying anything of his intention to his relatives; and this circumstance, no doubt, adds additional importance to the question whether or not the skull which was found and produced was really the skull of the missing man. It seems to me that, after having the statement on this matter of question of identification which Oojul made to the Darogah, it is impossible not to feel that the identification which looks so very complete on the record really rests upon a very infirm basis indeed. It looks very much as if the witnesses, after coming into contact with the police, discovered that it would be better if they could be a little more precise than they had been in this matter of identification. We see further, I think, that the form which the depositions have assumed in the Sessions Court is not altogether a perfectly natural and unvarnished statement of that which the witnesses had in the first instance actually observed and were capable of speaking to, because assuredly the statements of both Oojul and Lobun in the Sessions Court differ very materially from the version of the occurrence which was given by Oojul before the Inspector. In the Sessions Court

Oojul had said that, when he got up in the morning, neither Lobun nor his brother Tincowri were there, and that he and his mother did not get the information relative to Tincowri having been called away in the night till Lobun had been seen by the mother during the day, and told her about it.

And Lobun said pretty much the same, namely, that he got up in the morning, and simply called out to Oojul, who was inside the house, saying that he was going, and he went home.

Oojul, however, before the Darogah said: "In the morning, when I rose from my bed, I did not find my brother Tincowri in his bed. I therefore asked my cousin, the aforesaid Lobun Karigur, who had been in the same bed with Tincowri, about the latter, and he replied that a man had come at 2 prohurs in the night, called out Tincowri, and gone away accompanied by him."

Clearly I think, for some reason or other, the principal witnesses to the preliminary facts in this case have very materially varied their testimony in the Sessions Court as compared with the statements which they made at first, when it may be supposed that they made them unbiassed. The result then is, that, taking the evidence on the record all together other than the deposition of Soorut Ali and the statement of Ram Indro, which I shall notice in detail presently, it may be almost said that the case of the prosecution is scarcely even started, and certainly that evidence does not in any degree tend to implicate any one of the prisoners in the commission of the offence with which they were charged.

But Soorut Ali's evidence, so far as it can be depended upon, entirely alters the complexion of the case. I will read it at length. He says: "I am Mohesh Biswas's servant. I have been so for 7 years. I knew Tincowri. I had known him for a year. We were friends. He had an intrigue with Sonamoni. Had had one for about a month. Sonamoni used to go to his bari, and Tincowri used to go to her father Mohun Dass's bari, and used to play dus-puchees. He used to play too at Mohesh Biswas's bari, and so did I and Mohesh, and Prilhad and Dwarik and Goggun. Tincowri also had an intrigue with Mohesh Biswas's wife; they had only talked together, nothing more. Ten or fifteen days before his death, Tincowri and Mohesh's wife were talking together on their way to the ghât, and Mohesh saw them, and Tincowri saw that Mohesh had seen them. Mohesh was going to the ghât to bathe. On Thursday, in Assar, I was sleeping in the verandah of the south house of Mohesh's bari, when at midnight Mohesh Biswas called me, and he said: 'Call Tincowri to come and play.' I said, 'It is a dark night and late: how can you play now?' He said, 'Go and call him.' I then went to Tincowri's bari; he was in the verandah of the house; one house is on the south; he was not in that, but in the other. There was another man in the verandah, but I did not recognize him. I told Tincowri, Mohesh Biswas had called him to come and play, and he got up and went with me to Mohesh's bari. We found Mohesh Biswas sitting in the verandah of the south house; then Mohesh said, 'Come and play in Mohun Dass's bari.' We three went there, and I said, 'I see no play,' and then Mohesh put his gamcha round Tincowri's neck, and pulled him into the south house. No one was in it. Mohun Dass has two houses. Mohesh told me to stand in the oothan, and I did so. Then Dwarik Joardar, Prilhad Dass, Goggun Sikdar, Bonku Biswas, came in; they had been all round the south house before that, and they went inside it. A little after that, I heard Tincowri groan (gengraite). A little after they brought him out; he was then dead: they then carried him by the path by Bishonath Sikdar's bari to the mât. I forget which side of the village that is. They took the body 5 or 6 or 7 rusees into the mât, and put his body down in the indigo. Mohesh Biswas had a dâo in his hand, and he gave Tincowri a cut on the head with it, and then Dwarik and each of the men hit Tincowri a cut on the head with it. Ram Indro Dass came with the body, but I did not see him go into the house. He did not carry the body or cut it, but merely went with it. Then all the men, except Ram Indro and myself, cut the body into pieces with the *dâo*, and put them into a sack, and then we all went to the river, which is ten rusees from there. The men, except Ram Indro and myself, then put sand in the sack, shut up the mouth, and then Prilhad brought a bamboo from some mulberry (pât) land, and then they all pushed the sack out into the stream; after that, they washed their hands and feet, and then we all returned to Mohesh's bari. The sack sank. I can't say who carried the sack. I told the Magistrate Bonku did so, and he did. Then the men told me and Ram Indro not to tell any one. Bonku brought home the *dâo* after all the men went home. Mohesh and I and Bonku remained at Mohesh's bari. Early in the morning, Mohesh sent me to Kooshtea to see

how his brother Taruk Biswas was. Kooshtea is 7 or 8 coss from Mohesh's village. I arrived on Friday at mid-day, and I saw Taruk. I told him I had come to see him. On Saturday I returned and reached Sriram-pore in the evening. The next day, Sunday, early, as I was going to the ghât, I met Oojul Karigur, and he asked me if I had seen Tincowri, and I said no. On Monday, Khoda Bux found the skull, and in the evening Mohesh told me to take care and say nothing that it was Tincowri's skull; the skull must have been left out of the bag by accident. I did not see it. On the night of the murder, Mohun Dass was sleeping in his verandah of his east house, and Sonamoni was with him. I only saw those two. I saw Sonamoni. She had no cloth over her face. I think Mohun's wife was inside. Mohun and Prilhad used to sleep in the house where the murder was committed, but they did not do so the night of the murder. (Identifies all the prisoners.)

"The river-ghât for bathing is 8 rusees from Mohesh's bari; there are houses on both sides of the road. Tincowri and Mohesh's wife were talking near Gopal Biswas's bari, they were standing; this was at mid-day I saw them. I was going to the ghât; I was in front, about 10 haths distant. I did not see Tincowri play at Mohesh's bari, nor at Mohun's. Play used to begin in the day at mid-day, and cease before evening, and used to begin again after evening, and last till mid-night or 2½ prohurs. I can't say why I told the Magistrate I slept in the west house. I was asleep when Mohesh called me. When I went to go to sleep, Mohesh was eating. I forget whether Tincowri went to play at Mohesh's 8 times after he was seen talking to his wife; it is four months ago (told the Magistrate) Tincowri did so. I called Tincowri once, and then he came; he did not ask me anything; when I called him, I said it was to play dus-puchees. I can't say if Mohesh had anything besides a dhooty when we went to Mohesh's bari. Tincowri never cried out. Tincowri's bari is 9 rusees from Mohesh's. I forget whether Bonku brought out the body; the other four men did; they did not put the body down in the oothan; five men carried it when they were outside; they held it high with their hands, and carried it. I can't say where Mohesh got the gamcha; after starting with the body no one went to his bari. I did not see the sack or *dão* before the body was put down. I saw nothing besides these when the body was put down. The *dão*-handle had been broken before. The *dão* was one for cutting sugar-cane; the handle was split and broken, but there was some handle. The body was on the ground when it was cut up."

The witness was examined again on the next day, and said: "I know Hurchunder Nundi Peshkar; he came to my village after the skull had been found: he called all the villagers."

The rest of the statement is not very material.

I have said that this deposition entirely changes the complexion of the case. Manifestly, if it can be relied upon, it clearly establishes the charge of murder against the first four prisoners at least. But then this is the evidence of an accomplice. If the story which he gives is true (he went and fetched the man, was present when his master twisted the cloth round the man's neck, stood by while the man was dragged into the hut, accompanied the prisoners when they carried off the body, and put it down in the indigo-field, there stood looking on while every man excepting himself and Ram Indro, as he says, took the *dão* by turn, hacked the skull, and cut the body into pieces, and then went on with them, when the remains of the body, put into the sack, were pitched into the river), clearly the part he admits that he took in the whole of this transaction is such a participation in the principal acts of the murderers as constitutes him an accomplice; and it is well understood now that the evidence of an accomplice cannot be safely acted upon as against persons accused by him excepting when it is corroborated in regard to the particulars which implicate them. This principle has many times been enunciated by this Court, and inasmuch as a reported case has been referred to, in which the judgment of the Division Bench dealing with this very matter was delivered by myself, I will read from the note in 3 Bengal Law Reports, Full Bench Rulings, page 2, what was then said, because it still represents my views:—

"The whole of the charge against the prisoner depended upon the evidence of the two approvers. It is undoubted that a Judge, in cases where the material supporting the charge against the prisoner is afforded by the evidence of an approver, is bound very carefully to warn the Jury of the infirmity which necessarily attaches to that evidence. He is bound also to call to their attention the circumstance, if it be, in fact, the case, that the approver is speaking under the influence of a conditional pardon, that is, a

he also did not know, yet neither the one nor the other was asked whether they, in fact, knew each other personally at the time of the occurrence.

The Judge next says: "Then there is the evidence of Mohun Dass, the father of the prisoner Prilhad and of Sonamoni. This man was naturally not likely to be willing to disclose much, but even his evidence shows that, on the night of the murder, he heard the voices of Mohesh, Ram Indro, and Soorut Ali in his bari."

This is probably, to the very slight extent to which it may be depended upon, a corroboration of the statement of Soorut Ali, to the effect that Mohesh and Ram Indro were, at the time when Tincowri was, as Soorut alleged, strangled, in the bari of Mohun.

And "finally," the Judge says, "there is the confession of Ram Indro Das, which, under Section 30 of the new Evidence Act, may be taken into consideration against all the prisoners."

With regard to this, I shall proceed now to say a few words. But first I will remark that, up to this point, Soorut Ali's evidence has certainly not received that amount of corroboration from independent sources which would justify a Court of criminal justice in coming to the conclusion that the persons who are affected by it were guilty of the offence with which he accused them.

Ram Indro, the 5th prisoner, when before the Magistrate, made a long detailed statement of that which he knew of the case. Of course, it may be every word of it taken and acted upon as against himself, but it is only admissible against the other prisoners, whether for the purpose of corroboration of an accomplice's testimony or otherwise, so far as it is made available by Section 30 of the new Evidence Act, which says: "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

It appears to me that this Section must be interpreted to mean that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration so far, and so far only, as that particular statement of fact itself extends, against the other prisoners who are being tried, as well as himself, for the offence which is thus confessed. I think the two illustrations which are given to this Section bear out this view.

If this be so, we must be careful not to apply statements made by Ram Indro Dass before the Magistrate against other prisoners than himself further than those same statements amount in themselves to a confession of guilt on his part. The remainder of the prisoners, besides Ram Indro, I think, without exception, both before the Magistrate and in the Sessions Court, denied having any knowledge of, or any participation in, the murder, and Ram Indro Dass himself in the Sessions Court stated that whatever he had said before the Magistrate was untrue.

I will proceed to the statement which he did make before the Magistrate. He was asked by the Magistrate: "Do you wish to say something about the death of Tincowri Jola?"

Answer.—"Yes, I do wish to say. Tincowri Jola used to frequent the house of Mohesh Biswas. Tincowri had an illicit intercourse with Mohesh Dass's wife, Doorgamoney Dasi. Twenty days before this, I had known, one day, while Mohesh Biswas, Dwarik Joardar, and myself were going to work in the field, Mohesh said, 'A Mussulman has brought disgrace on the family of *Kyberto;* one day we must catch him and punish him.' Mohesh had told me and Dwarik, 8 or 10 days before, Tincowri was to be put to death. Thursday before Thursday last, at six dunds of time, I met with Bunko Biswas, who resides in a boat, and is cousin to Mohesh Biswas. I asked him: 'Did you not go to the boat,' and the reason is that he had told me twenty days before that he would start by boat to the north part of the country. On my asking this, he replied: 'I shall go to-morrow morning by boat.' On that Thursday, at night, when I was sleeping at my home, Mohesh Biswas, whose bari is about two rusees off, west to my bari, came at two-and-half prohur of night, roused me by applying his hands on my person. I said who he was, when Mohesh spoke out and said: 'Our old man,' namely, his father Nimanund Biswas, 'calls you.' Mohesh held my hand, and brought me to the bari of Mohun Dass, who has a village-relationship with him. I stood at the door of the house of Mohesh Biswas, and found Bunko Biswas, Dwarik Joardar, Goggun Sikdar, and Prilhad Dass; these four men (Mohesh being with me), who put to death Tincowri Jola, were speaking to themselves, 'What shall we do now; it is dead.' Dwarik Joardar was saying,

'Tincowri Joardar is dead; what should be done? and, unless concealed, there is no safety.' Nobody then responded to this at that time. Afterwards from the house the dead body of Tincowri was brought, and Goggun Sikdar and Bunko Biswas held and were carrying it to the field. I do not know whether there was any other proposal made at that time. They two carried it in their arms. I could then clearly see that it was Tincowri Jola indeed. Dwarik and Prilhad followed them. I declined going, but they urged me to accompany them, saying that it was a dark night, and I accompanied them. Mohesh Biswas was with us. Mohesh's domestic servant, Soorut Ali, joined afterwards at the call of Mohesh Biswas. Mohesh, after he had gone to the field, came back to his bari to get a *ddo*. The corpse was carried to a piece of indigo-land, which is three or four rusees off on the north, and a little west of the bari of Mohesh, and they cut into pieces the body with the *ddo* brought by Mohesh. Mohesh at first, then Dwárik, and then Goggun, these three, cut it into pieces. Prilhad commenced putting them into a bag which Mohesh had brought, but from what place I cannot tell. The bag which contained the body cut into pieces was tied up and carried by Bunko Biswas on his head to the river—River Kaligunge—on the east, four or five rusees off from the indigo-land. The bag was put down on the bank of the river; earth was put into the same bag, and again it was tied up, and with the help of a bamboo it was pushed up into the river. They came from that place to the ghât, where they washed their body, hands, and feet, and went away to their respective baris.'

Question.—"When did you, and how long after, reveal this?"

Answer.—"I did (not) reveal it to anybody at first, or until after the arrival of the Darogah Mohashye. I did not know before that the skull of Tincowri Jola was left lying on the same indigo-land; afterwards the people discovered it."

Question.—"How did you divulge the matters on the arrival of the Darogah?"

Answer.—"The Darogah and the zamindar's peshkar came to the village, collected many people; none of them could tell; but I spoke all this to the Darogah in the presence of the peshkar, whose name I do not know."

Question.—"Can you tell how had Tincowri Jola gone there?"

Answer.—"I cannot tell, that is, I do not know."

Question.—"Where were the inmates of the house of Mohun Das at that time?"

Answer.—"I saw Mohun Dass's daughter, Sonamoni, sitting by him, and I do not know where were the rest of the inmates. Mohun Dass and his daughter saw the body when it was brought out."

Question.—"Where was the man Soorut Ali, of whom you have spoken above, at the time?"

Answer.—"At the time when the body was being carried, and when out of the village, we met Soorut Ali Sheikh, but whence did he come there I cannot tell. He had nothing in his hands. He came and simply stood by us. He had no hand in the deed."

Question.—"Did you find any marks of violence on the person of the deceased when it was brought out?"

Answer.—"I did not see any mark of violence, but I thought that he was put to death by strangulation."

Question.—"How did you guess that the deceased died by strangulation?"

Answer.—"I could not find any blood at the time, and, therefore, I guessed that he died by strangulation."

Question.—"What became of the *ddo* with which the body was cut, and of the cloth?"

Answer.—"The said *ddo* with which the body was cut was washed with water, and taken away by Mohesh himself, and the cloths they had on were washed also, and they went with their respective cloths put on."

Question.—"Did the Darogah find the *ddo* and the clothes?"

Answer.—"At the searching of the house the *ddo* was found, but I do not remember what kinds of clothes they did each wear. All had clothes on. Some had *gamcha* round about their loins, and some had *chadur* round about. Such was the state of things at the night of occurrence. The bamboo with which the body was pushed into the water had been taken from a hedge of a mulberry-land. It was then thrown into the water."

Question.—"Did you point out to the Darogah the part of the river where the body was thrown?"

Answer.—"Yes, I did. The place was searched with bamboos, but nothing was found. It was a strong current twelve or thirteen cubits deep."

Question.—"Did you perceive anything before Tincowri was put to death?"

Answer—"I had not known that Tincowri was to be put to death at once."

Question.—"What assistance did they

receive from their having called you at the night?

Answer.—"The night was dark. My presence with them would not, I think, frighten them. I have no relationship with Mohesh: we call each other by names."

Question.—"Then, why did they call you in such a dreadful matter?"

Answer.—"Myself, a villager, having friendship with Mohesh Dass. Mohesh Dass is the husband of my mother's sister."

It is obvious, on the first perusal of this statement, that the prisoner keeps carefully clear of confessing any participation in the murder. The most that the statement, as a whole, amounts to is an admission on the part of Ram Indro of aiding and abetting by his presence all the other persons mentioned by him who were engaged in cutting and making away with the dead body of the man who had already been murdered. The statement, so far as it is a confession only, is, I think, limited to this, namely, the statement of facts which amount to a criminal participation in making away with the body; and consequently this is all which can be taken into consideration under Section 30 against the other prisoners. But this statement, so limited, undoubtedly does bring Mohesh Biswas, Prilhad Dass, Goggun Sikdar, and Dwarik Joardar to the indigo-field, and represents them as engaged there in cutting up and making away the dead body. It, therefore, corroborates the statement of Soorut Ali in those particulars. The question is—Does this amount to a sufficient corroboration such as will justify us in accepting as true, and acting upon, Soorut Ali's testimony?

On the whole, I think not; shortly for this reason, if, instead of being the statement of a fellow-prisoner, it had been the evidence given on oath of Ram Indro Dass, examined as a witness in the case, it would not have been anything other than the evidence of an accomplice, and, as such, I think it does not (I may say generally cannot) constitute satisfactory corroboration of the other accomplice's testimony. Certainly, in this particular instance, I think it is in itself extremely unsatisfactory. The whole of this part of the story, as told both by Soorut Ali and by Ram Indro, is somewhat unintelligible. In the first place, it is difficult to understand why the persons who found themselves suddenly under the necessity of getting rid of the dead body should not have at once taken the shortest course to the river, which, Ram Indro says, was at the time running with a very strong current and deep water; and why, instead of doing this, they should have stayed to cut up the body in an indigo-field, only with the ultimate view, after all, of pitching it into the river. And, even if they did really adopt this course, it is certainly very extraordinary that they should have been so careless as to leave the skull lying out upon the ground, when their very purpose was to make away thoroughly with all the pieces of the body; and then, again, the hacking of the skull as a preliminary measure by every one of the persons in succession, excepting by these two deponents themselves, seems to have been without any purpose whatever under the circumstances in which it is said to have taken place; although, on the other hand, this statement of these two men may be accounted for in an intelligible way, if we suppose that it had been designedly prepared to fit in with the fact of a skull having been found which already bore marks of cutting.

It is also very worthy of remark that Ram-Indro and Soorut Ali in their respective statements seem to be particularly careful to exonerate one another; at the same time, that they, with singular completeness, implicate each one of the prisoners in all the acts incident to the cutting up and making away with the body. Soorut Ali makes out that all in turn took a cut at the head, then they all in turn took the *dão* and cut up the body; and all took part, excepting himself and Ram Indro, in packing the body in the bag, and carrying it to the river.

I cannot help feeling that the statements of these two men, so far as they bear upon the complicity of the other prisoners besides Ram Indro, have been very carefully put together with a view to implicating these prisoners as completely as possible, and excusing themselves. Therefore, I do not trust them, and it seems to me that this is really a case of the worst possible kind of an attempt to use one accomplice's evidence to bolster up and corroborate that of another.

The result, then, of the best consideration which I have been able to give to the record in this case is that the evidence is altogether insufficient to support the convictions which have been come to of the first four prisoners, Mohesh Biswas, Prilhad Dass, Goggun Sikdar, and Dwarik Joardar.

As to Ram Indro, the case is different. His own statement before the Magistrate, if it can be believed, is most distinctly a confession of having knowingly and designedly taken part in the making away with and

concealment of a dead body which he knew was the body of a murdered man. The Judge and the assessors all believed this statement to be a statement which may be depended upon as against Ram Indro himself, and it seems to me that it bears on the face of it too much marks of truthfulness to be altogether rejected, so far as he is concerned.

I have already stated the grounds upon which I think it cannot be trusted as against the other prisoners; but I am not prepared to say that it ought not to be trusted so far as it amounts to an admission of guilt in himself. He further distinctly states that he knew this man was about to be murdered; that he knew this for some time previously, and he admits that he was called up, and came to Mohun Dass's bari, just exactly at the time when the murder had been committed. Soorut Ali's evidence, which throughout has apparently been given with a design as much as possible to shield Ram Indro, corroborates certainly all the statements of Ram Indro against himself, and I do not think that there is sufficient ground made out by the learned counsel for the prisoner why we should differ from the Judge and assessors in the Court of Session as to the bearing of this evidence against Ram Indro.

It seems to me that, although we are not in a position on the evidence which is before us on the record to come to the conclusion that the four first prisoners have been proved by that evidence to be guilty of the offence with which they have been convicted, yet the conviction of Ram Indro is good, and should be sustained.

The four first prisoners must, therefore, be acquitted, and the sentence passed upon them set aside.

The appeal of Ram Indro is dismissed.

The 25th January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Procedure—Insanity—Jury—Act X. of 1872, Section 425.

The Queen

versus

Doorjodhun Shamonto *alias* Deejobor.

A Sessions Judge, in his charge to the Jury, told them that, in his judgment, the accused was, at the time of his trial, exhibiting symptoms of unsoundness of mind, and he directed them to find whether the accused was insane at the time he committed the offence. HELD that the issue as to whether the accused was of unsound mind at the time of the trial, and incapable of properly making his defence, was a preliminary issue to that put by the Sessions Judge, and should, under Section 425 of the Code of Criminal Procedure, have been first submitted to the Jury.

Phear, J.—THE Judge, in commencing his charge to the Jury, says: "The accused Doorjodhun Shamonto is charged with the murder of Ram Jadoo, and, on being called on to plead to the charge, he has told you that he did kill Ram Jadoo, but he has given reasons for doing so, which are foolish and absurd, and which might lead to the inference that he is suffering under delusion, and that he is not to be accounted responsible for his actions.

"What you have, therefore, to try is, whether the accused, at the time he killed Ram Jadoo, was, by reason of unsoundness of mind, incapable of knowing the nature of the act he committed, or that he was doing what was wrong."

It appears to us from this statement of the Sessions Judge that there was a preliminary issue to be tried before that issue of insanity which he brought under the notice of the Jury, because it is clear that, in his judgment, the prisoner was, at the time he was called upon to plead, exhibiting symptoms, or something that might be considered evidence, of actual unsoundness of mind at the time of the trial. And Section 425, Act X. of 1872, the Criminal Procedure Code, enacts that, "if any "person committed for trial before a Court of "Session shall, at his trial, appear to the Court "to be of unsound mind, and incapable of "making his defence, the Court shall, in the "first instance, try the fact of such unsound-"ness of mind, and, if satisfied of the fact, "shall give a special judgment that the accus-"ed person is of unsound mind, and incapable "of making his defence." * * *

We think that the Judge ought to have asked the Jury in the first instance whether, upon the evidence before them, the prisoner was proved to be of unsound mind, and incapable of making his defence. It is obvious that the two issues of insanity, namely, that which I have just now mentioned, and that which the Sessions Judge proposed to the Jury, are not the same. For it might well happen that the prisoner was of unsound mind, and incapable of properly conducting his defence at the time of the trial, and yet of sound mind responsible before the law for his actions at the time when the deed was committed, which was charged against him.

And, further, it is, I think, obvious that it

is necessary to keep these two issues perfectly distinct in a criminal trial, because the questions which it should be proper to put to expert witnesses would be different upon the trial of these two issues respectively.

We, therefore, think that the trial before the Jury has not been a legally sufficient trial. We set aside the verdict and the sentence, and direct that the prisoner should be re-tried.

The 25th January 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Discharge—Re-arrest—Sub-Inspector.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Nuddea.

Ramdass Sadhoo

versus

Anund Chunder Roy.

A prisoner, who had been sent up for trial, and who was discharged by the Deputy Magistrate, was subsequently re-arrested by a Sub-Inspector on the same charge, and sent up for trial. The Deputy Magistrate considered the second arrest to be illegal, and prosecuted the Sub-Inspector for wrongful confinement, and fined him.

HELD that the Deputy Magistrate was right, the discharge from custody having been a useless procedure if the accused immediately became liable to be re-arrested without fresh material for prosecution of the charge.

Reference.—THE facts are simple. A prisoner being sent up for trial under Section 354, Indian Penal Code, was discharged by the Deputy Magistrate, as the witnesses against him were not forthcoming. He was subsequently re-arrested by the Sub-Inspector on the same charge, and sent up for trial. The Deputy Magistrate, deeming the second arrest illegal, prosecuted the Police Sub-Inspector for wrongful confinement, and fined him Rupees 15, remarking that the Sub-Inspector had shown an error in judgment rather than malice.

Two questions seem to me to arise :—

1st.—Whether the second arrest was legal or illegal ; and,

2ndly.—Whether, if it was illegal, the Sub-Inspector was punishable under the criminal law or not for a mere error of judgment.

I myself am inclined to think that the second arrest was not illegal. It is quite true that there is nothing in the law distinctly giving the police power to make a second arrest; but it seems equally true that no power is distinctly given to a Magistrate to take up a case a second time after the prisoner has been discharged. It is, however, acknowledged that, in a case in which a charge is necessary, a prisoner can be brought up again, provided he has not had to plead to the charge. It seems to me that there is nothing in the law to prevent such a second arrest ; and not to allow the power of making it would be, in some cases, to cause a failure of justice. The absence of a witness or of all the witnesses in a case may be the result of a mere accident, or even of a mistake. Nothing would be easier than for the investigating officer, if he were a dishonest man, to take care that the witnesses should not be present in time. But this should hardly have the effect of acting as a permanent and final release for the prisoner. I see no difference so far as direction of law is concerned between the power of the police to make a second arrest, and the power of a Magistrate to order it. It is quite true, as the Deputy Magistrate remarks, that it was never the intention of the Legislature to subject prisoners to repeated confinements; but, on the other hand, it does not seem that there is anything to prevent it. And, balancing advantages and disadvantages, it seems that more harm is likely to be done by refusing than by allowing the police to re-arrest.

With regard to the second point, there seems to me to be no doubt that the Sub-Inspector was acting in good faith. In making the re-arrest, he followed a practice which, I believe, is not uncommon, and has hitherto, so far as I am aware, been deemed to be correct.

Judgment of the High Court.

Phear, J.—We think there is no ground for interfering with the conviction and order of the Deputy Magistrate. The discharge from custody was a useless procedure if the accused immediately became liable to be re-arrested without fresh material for prosecution of the charge. We think the view taken by the Deputy Magistrate was right.

The 25th January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Procedure—Error—Act X. of 1872, Sections 283, 297.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

The Queen

versus

Ramkanoo.

To justify the setting aside the proceedings on a trial, the error must be a material error within the meaning of Section 297 of the new Criminal Procedure Code—*material* in that section being equivalent to "unless such error or defect has occasioned a failure of justice" in Section 283.

Phear, J.—ALTHOUGH, as the Judge points out, there has been error in the proceedings, still it does not seem to be a *material error* within the meaning of Section 297 of the new Criminal Procedure Code, such as would justify our setting aside the proceedings on the trial and the conviction. For that purpose, the error must be *material*, and we think that "*material*" in Section 297 is equivalent to the effect of Section 283, which says that: "No finding or sentence passed "by a Court of competent jurisdiction shall "be reversed or altered on appeal on account "of any error or defect, either in the charge "or in the proceedings on or before trial, or "on account of the improper admission or "rejection of any evidence, or by any mis-"direction in any charge to a Jury, *unless* "*such error* or defect *has occasioned a* "*failure of justice.*" * *

Here, according to the view which the referring Judge himself takes, there has been no failure of justice, inasmuch as it would appear that the charge which the prisoner originally made was, in reality, a false charge, and, therefore, the prisoner has been rightly convicted.

We, therefore, do not think it necessary to interfere with the conviction or sentence.

The 28th January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Procedure—Complaint—Warrant—Transfer of case—Trial of case.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

Raghoo Parirah, *Petitioner.*

A Magistrate removed a case to his own file from that of the Joint Magistrate after the latter had issued warrants upon the footing of the complaint, and immediately suspended the warrants and dismissed the complaint under Section 67 of the Criminal Procedure Code. HELD that the Magistrate ought to have proceeded with the case as from the stage at which he found it, and that he committed a material error by not doing so.

Phear, J.—IT appears that the Magistrate removed a case from the file of the Joint Magistrate to his own, after complaint had been made, and warrants issued by the Joint Magistrate upon the footing of the complaint. The Magistrate, having removed the case, immediately suspended the warrants, and dismissed the complaint, on the ground that he had previously in his executive capacity made some enquiry in the matter out of which the complaint arose, and from information that he so gained was of opinion that the complaint ought to be rejected under Section 67 of the Criminal Procedure Code. The words of this Section are, so far as it is necessary to read it now: "If, in the judg-"ment of the Magistrate, there be no suffi-"cient ground for proceeding, he shall dis-"miss the complaint."

We think that the Magistrate commited an error in taking this course. It has always been held by this Court that the proper officer to issue the warrant is the officer who has heard the complaint made, because it is he who can best exercise a discretion with regard to the *primâ-facie* merits of the complaint. When that officer has issued the warrants, the case ought to go on in due course according to the procedure prescribed by the Code, unless something occurs to show that the Magistrate who had issued the warrant had, from some cause or another, made a wrong exercise of his discretion, which has certainly not been the case here. It appears to me that when the Magistrate took the case from the Joint Magistrate's file, he ought to have proceeded with it as from the stage at which he found it; and I think he committed a material error by not doing so. In my opinion, therefore, the order of the Magistrate which suspended the warrants and dismissed the complaint should be set aside.

I do not think it necessary that we should transfer the case to any other Magistrate for complete investigation and decision, because I feel confident that the Magistrate

whose order is now in question, when he is made acquainted with the opinion of this Court, will duly carry out the investigation which the complaint initiated, and will come to a fair and judicious determination of the matter.

The 30th January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Sureties—Security-bond—Code of Criminal Procedure, Sections 300, 305.

(Miscellaneous Case.)

Brindabun Chunder Dass, *Petitioner.*

Tarinee Churn Mozoomdar, *Petitioner.*

Mr. J. S. Rochfort and *Baboo Greeja Sunker Mozoomdar* for the Petitioners.

Where sureties, who were required to show cause, under Section 305 of the Code of Criminal Procedure, why the bond executed by them should not be put in force, failed to establish by evidence the statements which they made, it was held that the order putting the bond in force was a proper one.

Per Phear, J.—Although the form of security-bond given in the Form (F) of the Appendix combines two bonds, namely, one for the principal and one on the part of the sureties, the provisions even of Section 300 would be complied with if these two bonds were upon two pieces of paper, instead of one.

Phear, J.—I AM of opinion that this application should be dismissed. The order of the Magistrate which we are asked to quash was passed under the provisions of Section 305 of the late Criminal Procedure Code. From that order an appeal (whether any appeal lay or not, it is not necessary now to say) was preferred to the Judge; and on that appeal the Judge upheld the Magistrate's order.

It appears to me, upon the showing of the petitioners before us, that, upon the day appointed by the Magistrate for showing cause under Section 305 why the bond executed by the petitioners should not be put in force, no cause was, in fact, shown by the petitioners. They simply said that, at an antecedent period, they had desired to be released from the obligation of the bond, and had made due application to that effect to the Magistrate, and that, at the time of making that application, the principals for whom they were sureties were in Court, and could have been taken into custody if the Magistrate had taken steps for that purpose. But, although they stated this, they certainly did not, as it appears from the papers before us, give any evidence in support of the statement. I hardly know what other course the Magistrate, who was then ready to hear cause, could then pursue but make the order which he has made in the absence of any cause shown, for the bond was admitted, and also the default of observing its conditions.

On appeal to the Judge and also before this Court, it has been urged that the bond which the petitioners entered into was invalid, because a personal security was not simultaneously taken from the principals whose sureties the petitioners were. But it appears to me that it is too late now to make this objection, whatever its worth may be. It was not taken before the Magistrate, and we have not materials upon the record upon which we can come to a conclusion of fact whether or not security was ordered to be taken from the principals in the first instance, or, indeed, whether security was or was not taken from the principal. We have among the papers an order of the Judge, apparently made under the provisions of Section 298 of the Criminal Procedure Code, which only directs security to be taken from the sureties. But this is by no means conclusive on the question whether or not security had been ordered, or had been taken from the principal. Although the Criminal Procedure Code says that the security-bond shall be in the Form (F) given in the Appendix, or to the like effect, and although this form combines two bonds, namely, one for the principal and one on the part of sureties, I apprehend that the provision even of Section 300 would be complied with if those two bonds were upon two pieces of paper instead of one.

However this may be, as I have already said, no objection on this head was taken by way of showing cause before the Magistrate, when, if it had been taken, evidence might have been forthcoming either in support of it or otherwise, and it is for that reason now too late to insist upon it.

I think the application should be dismissed.

The pleader admitting that this order will govern the case of Tarinee Churn Mozoomdar (Miscellaneous Case 239), it is ordered accordingly that that be also dismissed.

Ainslie, J.—I also think that this application should be dismissed. The only point we have to consider is whether the order

of the Magistrate is a proper order with reference to the cause which the petitioners showed, or attempted to show. They made certain statements which, if true, were probably sufficient. But they took no steps whatever to establish those statements, and the Magistrate was, therefore, in my opinion, right in making the order which he did make.

The 30th January 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Jurisdiction—Complaint—Assistant Magistrate —Section 68, Code of Criminal Procedure.

(Miscellaneous Case.)

Dhunput Singh, *Petitioner.*

Mr. R. T. Allan and *Baboos Sreenath Dass* and *Rashbehary Ghose* for Petitioner.

An Assistant Magistrate of a district has no jurisdiction to entertain a case as of his own knowledge under Section 68, Code of Criminal Procedure, as he does not fill the character of a Magistrate of a District or a Magistrate in charge of a Division of a District.

Where a case did not come before an Assistant Magistrate on complaint, or in any other way than by transfer from the Magistrate of the District, who himself initiated the proceedings under Section 68, the proceedings of the Assistant Magistrate were declared to have been without jurisdiction.

Phear, J.—It appears to us that the Assistant Magistrate had not jurisdiction to try this case. He could not entertain it as of his own knowledge under Section 68, because he does not fill the character of a Magistrate of a District, or Magistrate in charge of a Division of a District, and the case did not come before him on complaint or in any other way than by a transfer from the Magistrate of the District. Also it did not come before the Magistrate of the District on complaint or report of police; if at all, it came within his cognizance under the provisions of Section 68, and it has been held that, if a Magistrate of a District initiates a case under Section 68, he has no power to transfer it. The trial, therefore, having been held without jurisdiction, we think that the conviction must be quashed, and the fine remitted. If the fine has been paid, it must be refunded.

The 31st January 1873.

Present :

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Jurisdiction—Autrefois acquit—Commitment—Sessions Judge—Section 296, Act X. of 1872.

The Queen

versus

Taruck Nath Mookerjee, *Petitioner.*

Baboo Juggadanund Mookerjee for the Prosecution.

Mr. M. L. Sandel for the Petitioner.

In a case in which the accused was charged under Section 200, Penal Code, of the offence of using as true a false declaration which by law is receivable as evidence, the Magistrate, after taking evidence, discharged the accused, as he was of opinion that the charge was not made out, and that the evidence did not justify his framing any other charge against the accused.

The Sessions Judge, acting under Section 296 of the Criminal Procedure Code, then directed the Magistrate to commit the accused for trial for forgery.

Held that the Sessions Judge's order was bad, (1) because it was too vague and indefinite, as it did not specify the document which was forged and the particular in regard to which it was forged; and (2) because it directed the committal of the accused of an offence with which he had not been in any form accused before the Magistrate —Section 296 of the Code of Criminal Procedure empowering the Sessions Judge to direct a commitment only for some offence with which the accused was substantially charged in the complaint, or which was specified in the warrant, or which was framed as a formal charge by the Magistrate at the preliminary hearing.

Phear, J.—It appears that, in this case, Taruck Nath Mookerjee was, in consequence of some knowledge or information obtained by the Magistrate, brought before the Magistrate under a warrant to answer a charge therein specified as a charge made under Section 200 of the Indian Penal Code. After taking evidence, the Magistrate was of opinion that that charge was not made out, and that the evidence did not justify his framing any other charge against the accused. Accordingly, he discharged him from custody.

The Judge, exercising the powers given to him by Section 296 of the new Criminal Procedure Code, has directed the Magistrate to commit Taruck Nath Mookerjee for trial for forgery.

I think that this order of the Judge is bad for two reasons :—

In the first place, it is too vague and indefinite for the Magistrate to act upon. It should have specified the document which the Judge considered to have been forged

and also the particular in regard to which it was forged. Otherwise, I do not understand how the Magistrate, who in this matter will have to act in a ministerial capacity only, can properly frame his commitment upon any specific charge at all; and I must further say that, having regard to the evidence which was before the Magistrate, and which has come up to us on this occasion, I cannot perceive in what way any charge of forgery of a document can be made out at all.

And, secondly, I think the order is bad, because it directs that Taruck Nath Mookerjee be committed for trial for having committed the offence of forgery, that being an offence of which he had not been in any form accused before the Magistrate.

The Section, or that portion of the Section (296), which is applicable to the present matter, runs thus: "Provided that, in Sessions "cases, if a Court of Session or Magistrate of "the District considers that a complaint has "been improperly dismissed, or that an accused "person has been improperly discharged by a "Subordinate Court, such Court or Magistrate "may direct the accused person to be commit-"ted for trial." I read this to mean, may be committed for trial upon that matter of which he has been, in the opinion of the Judge, wrongfully discharged by the Magistrate; in other words, committed for trial for some offence with which he was substantially charged in the complaint, or which was specified in the warrant, or which was framed as a formal charge by the Magistrate at the preliminary hearing.

Unless the powers of the Judge under this Section to commit for trial be thus limited, it seems to me that a very strange result would follow, namely, that a man might be committed by the Judge for trial of an offence of which he had never been accused, or never even heard a word, as, indeed, would have happened here until he was apprehended under the Judge's commitment. And as the Criminal Procedure Code seems to have been carefully framed with a view to provide that no one shall be committed for trial without having previously had a fair opportunity of meeting the charge upon which he is to be committed, I think this result I have mentioned can hardly have been contemplated by the Legislature, and I do not think the words, when reasonably read with the context, do give the Judge so extensive a power as that which is now sought for him.

For these two reasons, I think the order of the Judge should be set aside.

We are told that, during the time when Taruck Nath Mookerjee was in jail, he caused a petition to be presented to this Court, upon which no final order has hitherto been made. Our present decision renders it unnecessary to make any order upon that petition.

The 31st January 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Jurisdiction—Adultery—Act XLV. of 1860, Section 497.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Hooghly.

The Queen

versus

Asgur Mullick.

The High Court quashed a commitment in a case in which the charge was that of adultery under Section 497, Penal Code, where it appeared that the committing officer had no jurisdiction, by reason of the offence having been committed at places beyond the local limits of the Sessions division to which the accused was committed, and where the Sessions Judge considered that there was no evidence to found a charge of enticing away the complainant's wife within such jurisdiction.

Reference.—I HAVE the honor to submit the proceedings of the case of Queen *vs.* Asgur Mullick for the orders of the High Court, because it appears to me that the commitment should be quashed as having been made without jurisdiction.

The prisoner has been committed for trial by this Court on a charge of having committed adultery (Section 497, Penal Code) at French Chandernagore and Calcutta.

On receipt of the letter of commitment and a copy of the charge, I called upon the Joint Magistrate of Serampore, the committing officer, to state on what grounds this Court had jurisdiction to try the prisoner, the offence having been committed beyond the local limits of this Sessions division.

The reply of the Joint Magistrate is annexed.*

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* The explanation of the Joint Magistrate was as follows:—

In reply to your No. 2, dated the 7th instant, I have the honor to explain that the young woman with whom the offence was committed was living in Serampore, when she was induced by the accused Asgur to leave her home, and go with him to Chandernagore.

I supposed that cases of this kind were contemplated by Sections 27 of the old and 65 of the new Criminal Procedure Code.

The offence began in Serampore, when Naziman left her home, and continued through the journey to, and

I am of opinion that Section 65 of the present Code and its corresponding Section 27 of the former Code do not apply to the present case, in which there is a sole charge of adultery. I have carefully perused the record, and can find in it no evidence that the prisoner enticed away the complainant's wife, though there would seem to be evidence of the commission of adultery.

The facts seem to be that prisoner is the woman's first cousin, and that they have lived in the same house (her father's house) up to the time of her disappearance therefrom; they are both about the same age, below sixteen years, and the Joint Magistrate records that the prisoner is the younger of the two. There is no evidence to show any enticing, or even that they left her father's house together; but there is evidence that they were found together in Calcutta, and that they slept together in Chandernagore.

I mention all these facts, because, though I have no doubt that the charge of adultery should be tried in Calcutta, as the complainant had also preferred a charge under Section 498, Penal Code (of enticing away his wife), I at one time thought that, if the case came to trial, there might be evidence to support such a charge; but from the record of the proceedings before the Magistrate, I do not think that this charge can in any way be established; and as the commitment, as it now stands, is contrary to law, I have thought it my duty to submit the case for the orders of the High Court in preference to taking it up for trial at the Sessions, which commences on the 13th instant.

Judgment of the High Court.

Ainslie, J.—The commitment must be quashed.

The 4th February 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Miscarriage—Attempts—Sections 312, 511, Penal Code.

The Queen

versus

Arunja Bewa and another, *Appellants.*

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of causing miscarriage, &c.

In a case in which the child was full-grown, the Court declined to convict the accused of causing miscarriage under Section 312, Penal Code—that Section supposing an expulsion of the child before the period of gestation is completed—but convicted them of an attempt to cause miscarriage under Sections 312 and 511 read together.

Glover, J.—On the face of the evidence of the native doctor that the child was full-grown, I think it improper to convict under Section 312, Penal Code, which supposes an expulsion of the child before the period of gestation is completed.

But the evidence is perfectly clear as to the intention and acts of the parties, and they may both be properly convicted of an attempt to cause miscarriage under Sections 312 and 511 read together.

I would not interfere with the sentence passed on Alef Sheikh; but, under all the circumstances of the case, I think that the woman, Arunja Bewa, will be sufficiently punished with six months' imprisonment with suitable labor.

Mitter, J.—I concur.

The 8th February 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Recognizance—Breach of the peace—Section 282, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of 24-Pergunnahs.

The Queen

versus

Omerto Lall and Buseerooddeen.

Parties who are not stated by a Magistrate to be likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, cannot be called upon to enter into recognizances to keep the peace simply because they did not interfere when they might have done so between the persons actually quarrelling so as to prevent a riot, their laches in this respect not bringing them within the purview of Section 282, Code of Criminal Procedure.

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residence at, Chandernagore, and journey to, and residence in, Calcutta.

In my copy of the old Procedure, the convenience of the public with respect to the attendance of witnesses is made, in a note, the guiding principle.

If the Sections of the Code referred to are not closely applicable, I have the honor respectfully to request that you will be pleased to amend the charge, and try Asgur under Section 498 of the Penal Code, instead of 497.

Glover, J.—THE parties who have been called upon to enter into recognizances to keep the peace are not stated by the Deputy Magistrate to be likely to commit a breach of the peace, nor to do any act that may probably occasion such breach. What is intended apparently by calling upon them to give security is to insure their interference with the parties actually quarrelling so as to prevent the likelihood of any further rioting. If the zemindars interested themselves actively in the matter, we dare say the dispute might be arranged, or fighting at all events stopped; but it is not shown anywhere, nor does the Deputy Magistrate say that the zemindars have done anything to occasion a breach of the peace; they may not have interfered to prevent it, but their laches in this respect would hardly bring them within the purview of Section 282, Code of Criminal Procedure.

We, therefore, in accordance with the Magistrate's recommendation, quash the order calling upon the principals, Omerto Lall and Buseerooddeen, to furnish security.

The 14th February 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Breach of the peace—Obstruction—Right of way—Sections 308, 320, Code of Criminal Procedure.

(Miscellaneous Case.)

Tarinee Churn Shah, *Petitioner,*

versus

Bonomali Nag, *Opposite Party.*

Baboo Doorga Mohun Dass for the Petitioner.

Baboo Kalee Mohun Dass for the Opposite Party.

Although a road may be a private one, a Deputy Magistrate has jurisdiction to make an order under Section 308, Code of Criminal Procedure, if it appears that Section 320 applies to it, that is, if it is open to the use of a certain class of persons who used it a few days before the occurrence of the dispute.

Glover, J.—THE objection urged by the petitioner in this case is that, as the Deputy Magistrate has found that the road is a private one, he had no jurisdiction to make an order under Section 308 of the old Criminal Procedure Code.

Now, although the Deputy Magistrate does find that the road is a private one, yet still the provisions of Section 320, he finds, apply to it, that is to say, that, although the road is not open to the use of the public, it is open to the use of a certain class of persons, namely, the ryots of the defendant; and there is no finding that these persons have not made use of their privilege within the last three months. It is contended that the Deputy Magistrate ought to have found whether these persons had or had not made use of the privilege, but as no objection seems to have been made on that head, and there is evidence that they had passed over this piece of ground a few days before the occurrence of the dispute, there is nothing illegal in the decision. It appears that the Deputy Magistrate had jurisdiction to decide the case as he did. We reject the application.

The 17th February 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Sanction for prosecution—False information—Head-constable—Act XXV. of 1861, Section 168—Act XLV. of 1860, Section 182.

(Criminal Motion.)

The Queen

versus

Grish Chunder Sirkar, *Petitioner.*

Baboo Huree Mohun Chuckerbutty for the Petitioner.

Where a person was accused under Section 182 of the Penal Code with having given false information to a head-constable, it was held that the provisions of Section 168 of the Code of Criminal Procedure had been sufficiently complied with, inasmuch as the Lower Appellate Court stated in its judgment that "the case had been forwarded under Section 182 by the officer in charge of the District Superintendent's office"—the District Superintendent being the official superior of the head-constable.

Glover, J.—THIS is a reference under Section 297, Act X. of 1872 (Code of Criminal Procedure).

The petitioner was charged, under Section 182, Penal Code, with having given false information to a head-constable at a police-station, in which he charged one Kajee Mofazzil Islam with unlawfully confining his (petitioner's) brother Eshan. The

Extra Assistant Commissioner convicted the petitioner, and sentenced him to pay a fine of Rs. 10, or to be rigorously imprisoned for twelve days.

The Deputy Commissioner upheld the conviction.

The point of law on which this appeal has been made here is that, under Section 168 of the old Criminal Procedure Code, no charge concerning a public servant described in Chapter X. of the Penal Code could be entertained without the sanction of the complainant's (the head-constable's) official superior, the District Superintendent of Police, and that the Deputy Commissioner was wrong in law in allowing this irregularity of procedure.

Now, this was not the petitioner's case in the Court below. He objected there that, as the information alleged to be false had been given to the Sub-Inspector, that officer alone had the right to make a complaint.

But, putting aside this, and assuming on the authority of Queen *vs.* Ramgholam Singh, XI. Weekly Reporter 22, that a head-constable is an inferior ministerial servant, it is clear from the Deputy Commissioner's judgment that a sufficient sanction was given.

I find there recorded that this case was forwarded under Section 182, Penal Code, for the purposes of a prosecution by the officer in charge of the District Superintendent's office, and was afterwards transferred by the Deputy Commissioner to the Court of the Extra Assistant Commissioner.

It would seem, therefore, that the provisions of Section 168, Act XXV. of 1861, have been substantially complied with.

As to the question of fact, whether the petitioner gave the information knowing it to be false, that is a point which we need not consider, it having been found as a fact by both Courts below that the information was so given, and no attempt has been made to show us that the finding was unsupported by evidence.

The objection as to the absence of the head-constable at the time of trial appears to be quite untenable; in any case, it would, I consider, come within the purview of Section 283, Act X. of 1872.

The application should, I think, be rejected.

Mitter, J.—I concur with my learned colleague in rejecting this application. The Deputy Commissioner says: "The case was forwarded under Section 182 by the officer in charge of the District Superintendent's office," and this circumstance is sufficient to take it out of the operation of the precedent relied upon by the petitioner. The objection based upon the alleged absence of the complainant on the day of trial does not appear to be borne out by the record.

The 18th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

License—Liquor—Agent—Act XXI. of 1856, Section 43.

(Miscellaneous Case.)

Ishur Chunder Shaha, *Petitioner.*

Mr. J. S. Rochfort and *Baboo Upendra Chunder Mitter* for the Petitioner.

Where a person sells liquor in contravention of and under color of a license which stands, not in his own name, but in that of the person for whom he is the recognized agent, he cannot be allowed to evade the provisions of Section 43 of Act XXI. of 1856 by setting up that it is not a license to himself.

Couch, C. J.—In this case the petitioner was charged with having sold liquor in contravention of his license. It is found by the Magistrate by whom he was convicted that he was not the actual vendor, but the recognized agent of the vendor, and that he admitted that he effected the sales under cover of the license which was taken out in the name of the person for whom he was acting as agent. The Magistrate considered that he must be treated as the vendor and as the person responsible for the sales in the shop for which the license was granted.

The sale of the liquor was clearly proved, and the question which was raised on behalf of the petitioner was whether his case came within Section 43 of Act XXI. of 1856, which provides that every person licensed to sell spirituous or fermented liquors or intoxicating drugs, who shall commit any act in breach of any of the conditions of his license, not otherwise provided for in the Act, shall forfeit for every such offence a sum not exceeding Rs. 50.

It appears to me that the petitioner, having made sales under cover of this license, although it is not in his own name, but in that of the person for whom he was acting as agent, cannot be allowed to set up that it is not a license to himself to sell liquors in this shop. If it is not, he would have been for some time breaking the law by selling liquor without a license. Although this license is not in

his own name, I think, for the purpose of dealing with him under Section 43, it must be considered that he was licensed to sell by it, and that his act was a breach of the conditions of his license. He must not be allowed to evade the consequences of this act by setting up that he had been illegally keeping this shop open for the sale of liquor, and selling liquors there. He has acted under the license, and had the benefit of it in previous transactions; and on that ground I consider that the conviction ought not to be disturbed.

But there is another reason why it ought not to be interfered with. Supposing there is an error here in the Magistrate's holding that this must be considered as his license, and that he was practically the vendor, there is no doubt that he did sell the liquor. If this was not his license, he has been guilty of a breach of the law in selling liquor without any license. On that ground we ought not to interfere, as he might have been convicted under another provision in the Act.

The petition must be rejected, and the papers must be returned.

The 17th February 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Murder—Grave provocation—Act XLV. of 1860, Section 300, Exception 1.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of murder.

The Queen

versus

Bechoo Saout and another, *Appellants.*

Baboo Juggut Chunder Banerjee for the Appellants.

To enable a person to plead the extenuating circumstances provided for in Section 300, Penal Code, Exception 1, the provocation and its effects must be sudden as well as grave; and the deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation.

Glover, J.—THIS appeal is made on two grounds: (1) that the evidence is insufficient and incredible; and (2) that, supposing it credible and sufficient, it shows that there was provocation of the gravest kind, and reduces the offence to culpable homicide not amounting to murder.

The first question is not without difficulty in consequence of the exaggerations of at least one of the two principal witnesses for the prosecution, and I agree with the Judge that a considerable part of the woman Bistee's evidence is open to doubt. I do not think, however, that the other woman, Golapee, is untrustworthy. No doubt, in the first part of her deposition, she speaks positively to what it is not likely that she could have seen, but in the latter part she explains herself, and admits that she had previously stated as facts what she only supposed to be so from what she had seen. As the Judge says, because she saw part, she guessed the remainder. I do not think we ought to discredit her altogether, because she at first exaggerated, and there seems no reason to doubt that the deceased Nobin, with whom she had an intrigue, did come into the hut where she was sleeping with her husband (Bijye) on the night in question, and was then and there seized and carried off by the husband to the southern house, where the father (Bechoo) was sleeping; nor do I see ground for disbelieving Golapee's statement that she heard the sound of a blow as of a pira or stool, and the father immediately after came out and fetched a bamboo, and then went back into the house where Nobin had been taken; nor that a few minutes afterwards she saw Nobin lying dead, and that next morning blood-marks were found on the stool and on various parts of the hut.

The fetching of the bamboo by Bechoo, and the subsequent seeing of Nobin's dead body by the witness Bistee, seem to me credible, and in these two points at least the two so-called eye-witnesses corroborate each other. There is independent and apparently quite trustworthy evidence to the fact that Nobin was seen in the prisoner's house up to 9 o'clock of the night of the murder, and that he had an intrigue with Bijye's wife.

It is also proved that the body was found next morning half immersed in a neighbouring tank, with a wound on the left temple, and with a mark as of strangulation on the neck.

Also that, when the Sub-Inspector went to search the prisoner's house on the day after the murder, he found what he took to be marks of blood on a stool (pira) and on various parts of the premises. It is a pity that the stains on the stool were not proved to be blood-marks; but the fact remains that the next day the stool with which the wound in

the head is said to have been inflicted was covered with what were apparently blood-stains.

On the whole, and after much consideration, I do not think that we should be justified in setting aside the judgment of the Court of Session.

Then as to the degree of the prisoner's criminality.

It may be at once conceded that a husband, finding a man in his room at night, who had come there for the purpose of intriguing with his wife, would have received the very gravest provocation, and that, if he attacked and killed the seducer then and there, his offence would not amount to murder. But the provocation and its effects must be sudden as well as grave; and when a man has time to cool down, and after having seized an intruder, under the circumstances stated in this case, takes him away to another room, and there, after being joined by another man, and so being in a position to render all resistance hopeless, deliberately first knocks his enemy down, and then suffocates him with a bamboo-pole placed and pressed upon his neck, the pole having to be fetched from the outside, he can hardly plead the extenuating circumstances provided for in Section 300, Penal Code, Exception 1.

The deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation, and it would require very strong evidence to support the plea in this instance, and to show that, so long after the provocation was received, the prisoner Bijye was still in that state of mental derangement from anger that judgment and reason had no dominion over him.

In Bechoo's case, I do not think that provocation was either grave or sudden.

I consider that both prisoners were rightly convicted of murder, and, that being so, the only secondary punishment allowed by law is transportation for life. Whether or not, under the circumstances of this case, such a punishment is not unreasonably severe, is a question for the Local Government.

Mitter, J.—I concur.

The 18th February 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Sub-Inspector—Police—Detention in hajut—Act X. of 1872, Section 124.

(Criminal Motion.)

The Queen

versus

Basooram Dass, *Petitioner.*

Baboo Rajani Nath Bose for the Petitioner.

Per Glover, J.—Where a Sub-Inspector of Police is charged with having detained prisoners for more than 24 hours, it is not necessary for the Crown to prove that he detained them with a guilty knowledge, as Section 124, Act X. of 1872, imperatively lays down that accused persons are on no account to be detained beyond that time except under special order of the Magistrate, which was not obtained in this case.

Glover, J.—THERE seems to be no error in law in these proceedings.

The Sub-Inspector admits that Kambhoo, although sent in as a confessing prisoner, did not, in reality, confess at all. On the contrary, whilst admitting that he had received the lac from certain persons named, he denied all knowledge of its being stolen property. The Sub-Inspector does not deny this, but says that, as he did not believe the latter part of the prisoner's story, he cháláned him as confessing the receipt of the property; a most strange explanation certainly, and one that fully justifies the remarks made by the Assistant Commissioner.

There was no necessity for proving on the part of the Crown that the Sub-Inspector detained confessing prisoners, or other prisoners, for more than 24 hours with a guilty purpose, inasmuch as the law, Section 124, Act X. of 1872, Code of Criminal Procedure, imperatively lays down that accused persons are on no account to be detained beyond that time, except under special order of the Magistrate; and it is clear from the petitioner's own statement to the Magistrate that they were detained, and that without any such special order.

The embodiment of all three instances of neglect of duty into one charge, so far as punishment was concerned, was not illegal. The several acts of disobedience took place during the conduct of the same enquiry. In any case, Section 283, Code of Criminal Procedure, would apply, for it is not pretended that the petitioner has been in any way prejudiced by the way in which the judgment was recorded.

The last objection, that the detention was not continuous, receives no support from any evidence. It seems clear, moreover, from the petitioner's own statement that the accused were in custody all the time. The mere fact of there not being a special guard

over them would not alter the nature of their position; they were still in detention, and unable to leave the thannah, or to go to their homes.

The application should be rejected.

Mitter, J.—I do not think that this is a proper case for the exercise of the special powers of revision vested in us by the Code of Criminal Procedure. The petitioner's own statements are sufficient to show that he was guilty of gross violation of duty, and I would, therefore, reject this application.

The 20th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Accused—Deaf and dumb person—Understanding proceedings—Previous convictions—Committal—Sessions Court—Act X. of 1872, Sections 186, 297, 315.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Magistrate of Sarun.

Doobri Hulwai

versus

A dumb person, name unknown.

In the case of an accused person who was deaf and dumb, the Deputy Magistrate who tried and convicted him considered that he did not understand the proceedings, and accordingly referred the case to the Magistrate under Section 186 of the Code of Criminal Procedure. The Magistrate considered that the accused did understand what he was charged with. HELD that the finding of the Magistrate must prevail, and Section 186 did not apply.

Acting under Section 297, Code of Criminal Procedure, the High Court annulled the order of the Deputy Magistrate, and, as the accused had been previously convicted of an offence under Chapter XVII. of the Penal Code, punishable with three years' rigorous imprisonment, ordered that he should, under Section 315 of the Procedure Code, be committed for trial to the Sessions Court.

Glover, J.—THE Deputy Magistrate sent up this case to the Magistrate under Section 186, Code of Criminal Procedure, in order that the High Court might pass such order as seemed proper.

The accused is, as the Deputy Magistrate states, both deaf and dumb, and "is unable to "understand the proceedings in the case." The Magistrate, however, says that he is satisfied from the man's demeanour and action that he did understand what he was charged with, *viz.*, house-breaking, and that he, being a very old offender in this particular, ought to have been dealt with under Section 75, Penal Code, and have been committed to the Sessions.

I presume that the Magistrate's finding, as to the accused's being able to understand the nature of the proceedings brought against him, must be taken as conclusive, the Deputy Magistrate's statement notwithstanding; and that Section 186, Code of Criminal Procedure, will not apply.

If that be so, the matter would come under the provisions of Section 315, Code of Criminal Procedure, for the accused is stated by the Magistrate to have been no less than seven times previously convicted of an offence under Chapter XVII., Penal Code, punishable with three years' rigorous imprisonment, and he should ordinarily have been committed to the Sessions, there being no question as to the extent of the Magistrate's power under Section 36 of the Code.

Under Section 297, Code of Criminal Procedure, this Court can, whenever there has been any material error in any judicial proceeding, pass such judgment, sentence, or order as it thinks fit; and, under this Section, it appears to me that the order of the Deputy Magistrate convicting the accused should be quashed, and the Deputy Magistrate be directed to commit the prisoner for trial to the Sessions Court.

The 20th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Receiving stolen property—Rubber-smuggling—Act XLV. of 1860, Section 411.

The Queen

versus

Bajo Huri, *Appellant.*

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of dishonestly retaining stolen property.

Where a person was charged, under Section 411 of the Penal Code, with having received stolen property (rubber, the produce of the Government forests at Cachar), and it was not proved that the rubber came from the Government forests, or that it was stolen property, or that the prisoner knew that it was stolen property, it was held that the conviction under Section 411 was bad, and that he could not be convicted of smuggling—smuggling India-rubber not being an offence under the Penal Code.

Glover, J.—THE appellant in this case has been convicted, under Section 411, Penal Code, of dishonestly retaining stolen property, *viz.*, 9 maunds 35 seers of India-rubber, and has been sentenced to nine months' rigorous imprisonment.

The rubber is said by the Deputy Commissioner to be the produce of the Government forests in Cachar, and the case is styled by him a "smuggling" case.

Section 411, Penal Code, makes it necessary that the party convicted should know, or have reason to believe, that the property found in his possession was stolen property. Now, in this case, there is no proof whatever that the rubber had been stolen. It is not shown that it came from the Government forests, or that it was not the produce of Munnipoor or some other of the independent Native States adjoining. The forests from which rubber is procured extend, we are told, for many miles along the British frontier, and the rubber found in the accused's possession may just as well have come from independent territory as from Cachar.

But if it were "stolen property," there is nothing on the record to show that the accused knew it to be such. He states himself to have been ordered to take the rubber in his boat by Buldeb, an agent of a Moorshedabad merchant, and that it was delivered to him for that purpose by Bhoja Singh. That the rubber was to be concealed, and that bribes were to be given to parties in authority to allow the goods to pass without molestation, would not show that the carriers knew, or had reason to believe, that the property was stolen, but only that they knew they were smuggling. This is, so far as the record shows us, what the accused did; but that is a very different thing from retaining stolen property, knowing that it was stolen. Smuggling India-rubber is not an offence under the Penal Code.

In a similar case, Queen *versus* Dussarut Dass, decided on the 18th November 1872,* a Division Bench of this Court held that Section 411, Penal Code, did not apply.

In the case of Queen *versus* Gouree Churn Doss, decided on June 28th, 1872,† and which was in some respects similar to this, the High Court upheld a conviction under Section 411, on the ground that there was ample proof of the guilty knowledge of the accused that the rubber had been stolen.

We think that the conviction of Bajo Huri should be set aside, and the prisoner released.

* 18 W. R. 63.

† The 28th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

The Queen

versus

Gouree Churn Doss, *Appellant.*

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of dishonestly receiving stolen property.

Kemp, J.—WE have read the evidence in this case, and have considered the petition of appeal. The accused's act appears to us to leave no doubt as to his guilty knowledge that the rubber had been stolen from Government.

The appeal is rejected.

The 24th February 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Procedure—Jury—Sessions Judge differing from verdict—High Court—Act X. of 1872, Section 263.

Reference to the High Court, under Section 263 of the Code of Criminal Procedure, Act X. of 1872, by the Officiating Additional Sessions Judge of 24-Pergunnahs.

The Queen

versus

Oottum Dhoba, *Prisoner.*

The Sessions Judge, differing from a majority of the Jury, who acquitted the accused, referred the case to the High Court, under Section 263 of the new Code of Criminal Procedure, to be dealt with as an appeal. Before proceeding with the case, the High Court considered it fair to the accused to give him notice to bring forward any objections he may have to the Sessions Judge's recommendation.

On a consideration of the evidence, the High Court convicted the accused of the offence with which he had been charged below.

Glover, J.—THIS case has been referred to the High Court by the Additional Sessions Judge of the 24-Pergunnahs under Section 263 of the new Criminal Procedure Code.

A majority of the Jury found the accused, who was charged, under Section 457, Penal Code, with lurking house-trespass by night with intent to commit theft, not guilty; but the Sessions Judge, considering that finding to be against the evidence, has sent the case up to be dealt with as an appeal by this Court.

Section 263, Code of Criminal Procedure, provides that cases so referred shall be dealt with as appeals, and the High Court may

convict the accused person on the facts, and, if it does so, shall pass such sentence as might have been passed by the Court of Session.

I have some doubt myself as to whether the law requires that the accused should have notice of any action proposed to be taken by the High Court under this Section, but we have considered it but fair to him that notice should be given, and that he should have time to bring forward any objections he may have to the Sessions Judge's recommendation. We postponed the hearing accordingly unto to-day.

* No one has appeared on behalf of Oottum Dhoba, but we have carefully gone through the evidence brought against him in the Sessions Court, and have no doubt that on that evidence the accused ought to have been convicted.

* *Note.*—The accused has since filed a petition; it contains nothing but general objections to the truth of the charge brought against him, and is almost identical with the defence put forward originally.

In accordance, therefore, with the Section above quoted, we convict the accused Oottum Dhoba of the offence of lurking house-trespass by night with intent to commit theft, and under Section 457, Penal Code, sentence him to rigorous imprisonment for five years. The man is an old offender, and has been convicted of the same offence within the last twelve months.

Milter, J.—I concur in the conviction and sentence. I have no doubt upon the evidence as to the guilt of the prisoner.

The 27th February 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Applications—Breach of the peace—Section 318, Code of Criminal Procedure.

(Miscellaneous Case.)

Gogun Pramanick and others, *Petitioners*,

versus

Ranee Surnomoyee and others, *Opposite Party*.

Mr. J. T. Woodroffe and *Baboo Sreenath Dass* for the Petitioners.

Baboos Mohiny Mohun Roy and *Bhuggobutty Churn Ghose* for the Opposite Party.

Applications by parties, who have been found not to have been in possession, to set aside proceedings of a Magistrate under Section 318 of the Code of Criminal Procedure, which are taken in order to prevent breaches of the peace, ought to be made without any delay.

Couch, C.J.—The case comes before us under Section 404 of what I may call the late Code of Criminal Procedure, which provides that, where there has been an error in the decision on a point of law, or a point of law should be considered by the Court, it may send for the record, and determine any point of law, and pass such order as may seem right.

This is a power which it is in the discretion of the Court to exercise or not as the case may seem to require. As to any point of law which should be considered or determined, the only point presented to us on the part of the petitioners is that there is no distinct finding respecting the third party to the proceedings being not in possession; and, as to the first party, it is not clear that the Magistrate has found that he is actually in possession, or has only based his decision upon the possession which may be presumed from his being entitled to the property. These are not points of law which it is necessary to determine. They only affect the regularity of these particular proceedings, and the application is, in reality, one on the part of one of the parties before the Magistrate to get his decision annulled.

Looking at it in that way, it seems to me that the delay in coming to this Court, which there has been, is important. The order of the Magistrate was made on the 5th of September. For more than four months, that order was allowed to stand and to have effect, and on the 30th of January in this year, the party whom the Magistrate found was not in possession applies to this Court to set aside the proceedings, and to set the matter at large, and leave it to be again disputed between these parties. I think the Magistrate has found, not it may be in so many words, but in substance, that the third parties were not in possession.

Whether the first party was in possession or not may be doubtful, but that the third parties were not in possession has been found. Seeing, then, that the application is made on behalf of the persons who have been found not to have been in possession, and who have no right to have that question tried over again, and that there has been so much delay in making the application, I think it ought to be rejected. It is most important, and I

think ought to be understood, that applications to set aside proceedings of this nature, which are taken in order to prevent breaches of the peace, ought to be made without any delay.

The 1st March 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Police-officer—False entry—Injury—Act XLV. of 1860, Section 218.

Committed by the Assistant Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of making a false entry with intent to injure.

The Queen

versus

Jungle Lall, *Appellant.*

Messrs. R. E. Twidale and *C. Gregory* and *Baboo Nilmadhub Sein* for the Appellant.

Where a chowkeedar was charged under Section 218, Penal Code, with having made a false entry in a chowkeedaree attendance-book, with a view to support a charge which was made against a Sub-Inspector of having made a false report regarding the length of absence from duty of another chowkeedar, and thereby to cause loss or injury to the Sub-Inspector, it was held that the intention was too remote to fall within Section 218.

Remarks by the Judicial Commissioner.—THIS case arose out of trial No. 1 of the Sessions for the month of August last, Queen *versus* Reeasut Ally, Sub-Inspector.

This officer was charged with having made a false report to his superior officer, to the effect that Poorun chowkeedar had been absent from his post for three days, whereas the chowkeedar had reported himself at the police-station after two days' absence only —the motive for such report having been to secure the dismissal of the chowkeedar, because he would not furnish grass for the Sub-Inspector's horse. The chief evidence against this officer was a chowkeedar's attendance-book kept at the police-station admittedly under charge of, and written up by, Jungle Lall constable, in which was an entry to the effect that the chowkeedar, though absent on 24th and 25th June 1871, had reported himself on 26th idem, and was entered as present up to the 30th idem.

It was found by this Court, after a very careful trial, that the report of the Sub-Inspector was perfectly true, and that the entry in the attendance-book of the chowkeedar's being present from 26th to 30th June was entirely false: it was also found that the complaint of the chowkeedar Poorun against the Sub-Inspector was equally untrue, and permission was accorded to that officer to proceed against the chowkeedar and the constable for the respective parts they had taken against the Sub-Inspector, which were clearly done with the intention of injuring him

The constable and the chowkeedar now stand committed to this Court, the former with framing a false document with intent to injure, as the entries in the chowkeedaree attendance-book are admittedly in his handwriting; the chowkeedar with having made a false charge, which is proved by his own admissions in the former case, in which he allowed that he had been four days absent from his post.

The defence of the constable Jungle Lall is that the entries in the chowkeedar's attendance-book were correct, but he has not been able to bring forward a single witness in the former or in the present case to prove that the chowkeedar Poorun really reported himself in person at the police-station on 26th June 1871, whilst, on the other hand, there is ample proof that he did not so report himself. The entries, therefore, of the attendance of Poorun from 26th to 30th June 1871 must be false, and from what was elicited on the former trial it is clear they were made for the purpose of injuring the Sub-Inspector; in fact, to support the charge formerly preferred against that officer. It seems probable that this Jungle Lall may have been merely a tool in the hands of others, but such dangerous tools merit exemplary punishment.

The case against Poorun chowkeedar is still more clear. He ought to have been charged under Section 211, Indian Penal Code, but the ends of justice will be sufficiently met by the punishment which can be awarded for the offence of which he has been tried, as, no doubt, when petitioning the Deputy Commissioner, he made the statement he did about the Sub-Inspector, more with the hope of being reinstated than with any premeditated intention of injuring that officer.

The Court, concurring with the assessors, finds that Jungle Lall is guilty of the offence specified in the charge, namely, that he, being a public servant charged with the preparation of a chowkeedaree attendance-book, did make an incorrect entry therein with intent to injure Sub-Inspector Reeasut Ally, and has thereby committed an offence punishable

under Section 218, Indian Penal Code, and the Court directs that the said Jungle Lall be rigorously imprisoned for a period of (2) two years.

The Court, concurring with the assessors, finds that Poorun Doosad is guilty of the offence specified in the charge, namely, that he gave false information to a public servant with intent to cause that officer to use his lawful power to the injury of Sub-Inspector Reeasut Ally, and has thereby committed an offence punishable under Section 218, Indian Penal Code, and the Court directs that the said Poorun Doosad be rigorously imprisoned for a period of (6) six months.

Judgment of the High Court.

Pontifex, J.—We think in this case that the conviction must be quashed. Under Section 218, the prisoner was charged with the intent to cause loss or injury to the Sub-Inspector Reeasut Ally. That, we think, was too remote an intention to fall within the Section. If the entry was false, the prisoner's intention obviously was to shelter the chowkeedar Poorun; and the offence which, under Section 218, he could be charged with would be that, by making that entry, he was endeavouring to save some one from legal punishment. We do not think, however, that the term legal punishment was intended to apply to a case of this kind, where, if the chowkeedar were found to have been absent, he could only be fined by his superior in the police. We therefore think that, in this case, the conviction must be quashed.

The 4th March 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Previous conviction—Charge—Punishment—Act X. of 1872, Section 439.

The Queen

versus

Rajcoomar Bose, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of wilfully secreting a packet, and destroying a registered letter, for the purpose of fraudulently appropriating a bank-note of Rs. 10.

Mr. M. M. Ghose and *Baboo Biprodass Mookerjee* for the appellant.

Baboo Juggodanund Mookerjee for Prosecution.

Under Section 439 of the new Criminal Procedure Code, if it is intended to prove a previous conviction against an accused person for the purpose of enhancing the punishment, it is necessary to state the fact of that previous punishment in the charge. If it is omitted, it may be added to the charge at any time previous to the sentence being passed, but not after.

Kemp, J.—The prisoner in this case, Rajcoomar Bose, has been convicted by the Sessions Judge of Nuddea, under Section 48, Act XIV. of 1866, the Postal Act, and has been sentenced, in consideration of his having been convicted of another offence during the same Sessions, to the maximum punishment allowed under that Section, namely, to seven years' rigorous imprisonment. The facts, which are beyond dispute in the case, are as follow: A registered letter was addressed to one Sree Ram Chunder Bruhmmah, of Soonteah, *viâ* Hurrah post-office. The letter was posted at the Narainpore branch office subordinate to that of Nyehattee on the 1st of May 1872. On the 2nd of May a packet challan was despatched from Nyehattee to Kishnaghur at 8-30 A.M. This challan covered three packets, one addressed to Kishnaghur khas, one to Kishnaghur sorting, and one from Baraset to Kishnaghur, so that there were two packets from Nyehattee, and one from Baraset. These packets were made over with another packet addressed to Buggolah to the guard Piziruddeen; Piziruddeen admits that in his book he only entered three packets instead of four. He also says that he made them over, not to the officer who usually receives them, but to one Benee Madhub, who, for some reason or other, which does not clearly appear, was on that day at the Buggolah station, and received the packets from the guard Piziruddeen. Benee Madhub admits receiving the four packets from Piziruddeen, and therefore we trace the four packets to Benee Madhub. He says that he made them over to the prisoner Rajcoomar Bose. Rajcoomar denies this, and Benee Madhub also states that, on delivering the packets to Rajcoomar, he called his attention to the fact that there were only three packets entered in the guard-book. It appears that Rajcoomar was under suspension, and the man who was to succeed him arrived at 3 P.M. on the 2nd of May. The next morning, a shopkeeper, Gooroo Churn, who has been examined in the case, goes to a well close to the post-office, a public well to which every body has access, to draw water. He lets down his lotah or ghurrah, at any rate, a vessel not having a very large

orifice, once into the well, and draws up in it not one paper, but three, namely, the challan, the cover of the letter addressed to the Soonteah Brahmin, and a portion of the registered receipt printed on yellow paper. On fishing up these papers, he is immediately accosted by Jullodhur, who was in a shop close at hand, and who has also been examined, and who was then under suspension at the instance of the prisoner who had represented his misconduct. On seeing Gooroo Churn at the well with these papers, Jullodhur immediately said this is the letter to the Soonteah Brahmin. After that Benee Madhub comes up, and another paper, namely, the remaining portion of the registered receipt, is also found near the well. These papers are taken to the successor of the prisoner, who immediately reinstates Jullodhur in the post which he had lost at the instance of the prisoner. This appears clear from the evidence of Jullodhur.

Upon this evidence, and from the fact that on that day the prisoner had asked a mahajun of Buggolah to change a 10-rupee note for him, the prisoner has been convicted and sentenced, as already observed, to seven years' rigorous imprisonment. We may here mention that the missing letter contained a 10-rupee currency-note.

The assessors are of opinion that, although there is some suspicion against the prisoner, there is not sufficient evidence to convict him; and in this opinion we concur. From the challan of the 2nd of May, it is clear that the prisoner forwarded this challan to Kishnaghur without any alteration. In this challan, distinct mention is made of three packets addressed to Kishnaghur, one of them a sorting packet, and there is the evidence of a superior post-office official that it is not the custom for the intermediate post-offices to compare the packets with the challans addressed to other post-offices, and there could have been no such comparison on the part of the prisoner, because he forwarded the challan to Kishnaghur, well knowing that he had only forwarded two packets, whilst the challan purported to cover three packets, and that this would be immediately detected by the checking officer at Kishnaghur. Then the finding of the papers in and near the well is, to say the least of it, most suspicious. The papers do not look as if they had been down a well, and it is also very extraordinary, if the papers were floating, as alleged separately, on the surface of the water, that with one dip of his lotah Gooroo Churn should have been able to fish up all the three papers. Then there is the suspicious fact that Benee Madhub and Jullodhur were the only men present near the well at the time, it being a public well in the middle of the bazar, and they both being at enmity with the prisoner, Benee Madhub having been fined at the instance of the prisoner, and Jullodhur having been suspended. There is also the fact that, if the packet had been made away with by the prisoner, he having had plenty of time to get rid of any such evidence against him, it is quite impossible to believe that he would have thrown those papers into and near a public well close to the post-office, and to which everybody had access. The only remaining piece of evidence, if it can be called evidence, is that the prisoner went to a mahajun to change a note of 10 rupees. The mahajun states that the prisoner asked him to change a 10-rupee note for him, that he asked the prisoner to endorse it with his name, but that the prisoner refused, saying that the person who had given him the note had not written his name on it, and why should he write his? It is not the custom to endorse 10-rupee notes, although it is certainly so to endorse notes of a higher amount. However, be that as it may, the prisoner said: "I did not receive the note endorsed, why should I endorse it?"

On the whole case, concurring with the assessors that the offence charged is not sufficiently established by the evidence, we give the prisoner the benefit of the doubt, and acquit him.

We wish to mention that the Sessions Judge, in passing the severe sentence of seven years' rigorous imprisonment, makes allusion to the fact of the prisoner having been convicted of another offence at the same Sessions. But under Section 439 of the new Criminal Procedure Code, if it was intended to prove a previous conviction against the accused for the purpose of enhancing the punishment, it was necessary to state the fact of that previous punishment in the charge; and if this is omitted, it may be added to the charge at any time previous to the sentence being passed, but not after. Now, this fact was not added to the charge, and therefore the Judge was wrong in allowing it to affect the measure of punishment.

We direct the immediate discharge of the prisoner.

The 5th March 1873.

Present :

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Accomplice—Corroboration—Evidence—Act I. of 1872, Sections 114 and 133.

The Queen

versus

Luchmee Pershad, *Appellant.*

Committed by the Joint Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of defamation.

Baboo Boodh Sein Singh for the Appellant.

Although, under Section 133 of the Indian Evidence Act, the conviction of a prisoner on the uncorroborated testimony of an accomplice is not illegal, the Court, having reference to Illustration (b), Section 114 of that Act, considered in this case that the accomplice was unworthy of credit.

Kemp, J.—THE prisoner has been convicted under Section 500 of the Penal Code. There is no evidence that the prisoner published the petition, exhibit A, and the only evidence implicating him in the making of it is that of the witness No. 4, Bachu Lall, who is an accomplice. Under Section 133 of the Indian Evidence Act, Bachu Lall is a competent witness, and a conviction would not be illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice; but with reference to illustration (b), Section 114 of the said Act, the Court may presume "that an accomplice is "unworthy of credit, unless he is corroborated "in material particulars." In this case, we find no corroboration of any kind, much less in material particulars. The witness No. 6, Bisheshur Opadyah, states that he met the witness No. 4 at a ghât in the first half of the month of Assin; that he officiated as priest in connection with some religious offices on behalf of the witness No. 4, and received from him a few pice which were paid at the prisoner's house. No date is given, and there is nothing in the evidence of the witness No. 6 to convict the prisoner with the offence with which he is charged.

The case for the prosecution depends entirely upon the evidence of the accomplice-witness Bachu Lall, and, as his evidence is wholly without corroboration, we do not think it safe to convict.

The prisoner is acquitted, and a warrant will issue for his immediate release.

The 7th March 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Procedure—Conditional pardon.

The Queen

versus

Bipro Dass and others, *Appellants.*

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of murder.

Mr. Mun Mohun Ghose for the Appellants.

HELD that a Sessions Judge acted irregularly in at once trying and convicting a person who had been granted a conditional pardon by the Magistrate, and who had been sent up to the Sessions Court as a witness for the Crown. The Sessions Judge was directed to order the Magistrate to commit the accused to the Sessions for a fresh trial after hearing his defence and examining his witnesses.

Kemp, J.—WITH reference to the prisoner Chukree Dass, objection was taken by the Counsel who appears for him that this prisoner, having been offered a conditional pardon, was sent up to the Sessions Court as a witness for the Crown; but on his not conforming with the conditions of the pardon tendered to him, the Sessions Judge cancelled the pardon granted by the Magistrate, and there and then placed him in the dock, tried him, and sentenced him to transportation for life. This proceeding, the learned Counsel says, is illegal and contrary to the provisions of Section 359 of the old Code of Criminal Procedure, which says that, except in cases referred to in Section 172 of the Act, a Court of Session, as a Court of original criminal jurisdiction, shall not take cognizance of any offence, but upon a charge preferred by a Magistrate. With reference to Section 426 of the same Code, the sentence passed by the Sessions Judge being one not passed by a Court of competent jurisdiction, that Section will not apply, nor will Section 439, which enacts that no trial held in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity has occasioned a failure of justice. In this case we think that the prisoner Chukree Dass has been prejudiced by the proceedings of the Judge, inasmuch as, if he had directed the Magistrate to commit him, the prisoner would have had an opportunity of adducing witnesses on

his behalf, of which he has been deprived by the proceeding of the Judge. We, therefore, in the case of Chukree Dass, order that the Sessions Judge shall direct the Magistrate to commit Chukree Dass to the Sessions Court for a fresh trial, after hearing what he has to say in his defence, and examining any witnesses he may wish to adduce.

With reference to the prisoners Bipro Dass, Baoree Mudee, and Shiboo Sutee, we think that the conviction must be confirmed. We have carefully considered the case, and we find that the confessions of Bipro Dass, Baoree, and Shiboo each implicate the others, and are consistent as to the part which each of the prisoners took in the murder of the deceased. There is also the evidence of two independent witnesses who are connected with the prisoners, and on the whole case we think that the prisoners Bipro Dass, Baoree, and Shiboo Sutee, have been rightly convicted, and we therefore reject their appeal.

The 12th March 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Statement by deceased—Murder.

The Queen

versus

Degumber Thakoor and others, *Appellants.*

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of murder.

Baboo Debendro Narain Bose for the Appellants.

In a case of murder, the statement made by the deceased in the presence of his neighbours and of a head-constable was admitted as relevant evidence, under Section 32, Clause 1, Act I. of 1872, that Section providing that such statement is relevant whether the person who made the statement was or was not, at the time when it was made, under expectation of death.

Kemp, J.—THE prisoners, Degumber Thakoor, Joya Jaloo, and Mahomed Hossein, have been convicted of the offence of murder under Section 302, and under the circumstances of the case have been sentenced to transportation for life. The Sessions Judge observes that, "in the absence of any eye-witness as to what led to the attack on the deceased," he was of opinion "that the alternative sentence of transportation for life would satisfy the ends of justice." In this case, from the medical evidence it is clear that the deceased must have been very severely injured: seven ribs on the left side and three ribs on the right side, near the sternum, were broken, and the sternum itself was fractured near the articulation with the clavicle. The medical evidence also states that there were severe injuries to the chest, which were the cause of death, and that these injuries, namely, the fracture of the ten ribs and the injuries in the chest, must have been done by repeated blows of some blunt implement. There is evidence, and particularly the evidence of Ooma Jaloonee, a servant of the prisoner Degumber Thakoor, who was sleeping on the prisoner's premises on the night of the occurrence, that she heard a noise which she describes as a noise of gurgling. We do not lay any great stress upon this part of the witness's evidence, but there is the fact which is significant that, when she woke up and made enquiries, she was immediately threatened by the father of the prisoner, Degumber Thakoor. Then we have the evidence of witnesses, who depose that they saw the three prisoners with sticks in their hands close to the thakoorbaree, in which place, immediately after, they found the deceased. It is true that one of the witnesses before the Magistrate stated that he saw three men, but that he did not recognize them, and in the Sessions Court he mentioned them by name, but in the Sessions Court, on being asked to explain this discrepancy, he stated that he was confused at the time his examination was taken before the Magistrate, and also that he was suffering great grief at the death of his brother; the witness being the brother of the deceased. Then we have the important feature in the case, the statement of the deceased. This statement, under Section 32, Clause 1, of the new Evidence Act, Act I. of 1872, is relevant, whether the person who made the statement was or was not, at the time when it was made, under expectation of death. The illustration to that Section, *viz.* (*a*), appears to apply to the present case; the question is, says the illustration, whether A was murdered by B; the statement made by A as to the cause of his death is a relevant fact. In this case, the deceased made the statement which he did, not only before his neighbours, but also before the head-constable, and the head-constable is, no doubt, an independent witness. It is true that the motive assigned by the deceased is, as observed by the Judge, not altogether an adequate one. He states that, on the night of the occurrence, he saw the prisoner,

Mahomed Hossein, talking with the wife of Degumber Thakoor, the prisoner No. 1; that he, the deceased, remonstrated with Mahomed Hossein on the impropriety of his talking with a married woman; and that upon this Mahomed Hossein and the two other prisoners, Degumber Thakoor and Joya Jaloo, set upon him; Mahomed Hossein first attempting to strangle him with a cloth, and the rest severely beating him. The assessors seem to think that it is probable that there was an intrigue between the deceased and the wife of Degumber Thakoor. There is no evidence of this on the record, and on the whole we must say that the motive for this murder has not been clearly established. It has been said in the course of the argument that the witnesses who have been examined with reference to the statement made by the deceased were, during the days which the trial lasted, or for some eight days, with the head-constable, and that they have deposed to matters connected with the statement made by the deceased under the influence of the head-constable. There is no evidence whatever of this. As a matter of course, the head-constable with the other witnesses in the case would be sent up together to the Sessions Court, and they would remain probably all together under the surveillance of the Nazir or of the Court Inspector. There is nothing in the case to show that the head-constable used any undue influence over these witnesses. The evidence of the Civil Surgeon as to the injuries inflicted upon the deceased shows that these injuries were unusually severe. We have already stated the extent of these injuries, and on the whole case, after hearing the whole of the evidence and the argument of the pleader, we see no reason whatever for interfering in the matter.

We, therefore, confirm the conviction and sentence passed by the Sessions Judge.

The 15th March 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Murder—Sentence—Jury—Sanity of accused—Medical evidence—Act XLV. of 1860, Section 303—Act X. of 1872, Section 263.

Reference to the High Court, under Section 263, Code of Criminal Procedure, by the Officiating Additional Sessions Judge of the 24-Pergunnahs.

The Queen

versus

Doorjodhun Shamonto, *alias* Deejobor.

Where a person under sentence of transportation for life on a conviction for murder is found guilty of murder on a subsequent and different charge, the only sentence that can be passed on him according to Section 303, Penal Code, is that of death. The prisoner, who was charged with having committed murder, was found by the Jury who tried him to have been of unsound mind at the time he committed the offence. The Sessions Judge, differing in that point from the Jury, referred the case to the High Court under Section 263 of the Code of Criminal Procedure.

HELD that, in a case of this kind, the High Court will not interfere without the very clearest proof that the Jury were mistaken, and that the interests of justice imperatively required the Court to take action under the extraordinary powers conferred upon it by Section 263, Code of Criminal Procedure.

On a consideration of the medical evidence, the Court declined to interfere with the verdict of acquittal, which the Jury came to.

Glover, J.—THIS case has been referred to the High Court under Section 263, Code of Criminal Procedure, the Additional Sessions Judge disagreeing with the verdict of the Jury, which found the prisoner not guilty of the offence of murder, in that, "by reason "of momentary unsoundness of mind, he was "incapable of knowing the nature of the "act he committed, or that he was doing "what was wrong or contrary to law."

Notice was served on the prisoner, but no one has appeared on his behalf.

The Sessions Judge considers the finding of the Jury opposed to the medical evidence recorded on the trial, and recommends that the verdict of the Jury should be set aside. At the same time, he does not think that the case is one in which a capital sentence should be passed.

The prisoner was, at the time of trial, already under sentence of transportation for life on a conviction of the murder of a child for the sake of his ornaments, so that, if he be found guilty of murder in the present case, the only sentence that could be passed, according to Section 303, Penal Code, would be death.

The circumstances under which the present crime was committed are as follow: The day after his conviction of child-murder, the prisoner made a sudden attack on a fellow-convict in the jail work-yard, and killed him, whilst asleep, by fracturing his skull with a large stone. He was tried, and found guilty, and sentenced to death; but the High Court (Phear and Ainslie, JJ.) set aside the conviction, and ordered a new trial, on the ground that the question of the prisoner's state of

mind, at the time of trial, had not been left, as it ought to have been, to the Jury.

The prisoner was accordingly re-tried, and the Jury found that he was at present sane and capable of making his defence; but that he was, at the time of committing the crime, of unsound mind as above stated.

There is evidence on the record that the prisoner was considered for some time past to be "pagul," or out of his mind; but the Sessions Judge has disregarded this evidence on the strength of the medical testimony which he considers as proving the contrary.

In a case like this, where a man's life is at stake, and where the question for decision is one on which all unprofessional opinion is likely to be equally good, we should be most unwilling to interfere with the unanimous finding of a Jury of educated men come to on the evidence before them without the very clearest proof that they were mistaken, and that the interests of justice imperatively required this Court to take action under the extraordinary powers conferred upon it by Section 263, Code of Criminal Procedure.

The medical evidence, on which the Sessions Judge relies, is to the following purport:—

Dr. Lynch, the Jail Superintendent, on the 17th February 1873, deposes that he considers the prisoner "free from any intellectual "insanity," that he "knew the nature of the "act he committed," and that he was capable "of distinguishing between right and wrong." He adds: "I think the accused is sane, but "not perhaps on the same level in point of "intellect with other people of his class "from congenital causes. I should not say "that his intellect is weak. He is perhaps "a little shifty and unsettled."

But on the 23rd of November 1872, when the first trial was held, Dr. Lynch said, with reference to this prisoner, "I think that he "is more imbecile than sane. I do not think "he is as sensible as natives of that class "usually are, but I consider that his defects "are more moral than intellectual." In another place he says: "His manner, when he first "came into the jail, was strange;" and again: "His manner, when he first came to "jail, was silly. He talked of the crime "with perfect unconcern, and that has con-"tinued."

No doubt, Dr. Lynch also expressed an opinion that he believed the prisoner to have known the nature of the act he was committing, and that he was doing wrong. He, Dr. Lynch, also thought that there was not that amount of disease in the prisoner's mind which would prevent his reflecting or estimating the consequences of his acts.

The impression left on our minds by this evidence is that the prisoner was, in Dr. Lynch's opinion, to some extent diseased in mind at the time he committed the murder, but not sufficiently so to prevent his knowing right from wrong. The distinction is one very difficult to draw, and might, in many cases, entail very hazardous consequences. The distance between mental disease that incapacitates a man from knowing right from wrong, and mental disease that still leaves him in possession of that faculty, is one not easy to be measured, and the question whether the prisoner belongs to one or the other category is one that a Court of reference, dealing only with the record, not having the medical witnesses before it for examination, might well object to decide.

Dr. Cayley, whose deposition before the committing officer was put in evidence, he having in the interim left Calcutta for Cuttack, says: "I believe that he (the prisoner) knows "the difference between right and wrong, "but that the moral qualities are deficient in "him, and that his powers of self-control "are below the average;" and again: "I do "not consider him positively insane, but of "a morbid mind." Dr. Cayley thought that the incoherency in the prisoner's manner was to a great extent assumed, but he admitted that "he had always talked in a child-"ish way."

After giving full consideration to these opinions, which being those of professional witnesses are entitled to respect, we think that they are not of such a direct or decided character as would justify us in saying that the prisoner was *undoubtedly* sane at the time of committing the murder with which he is now charged, and nothing short of such a conviction on our part would warrant our interference with the verdict of acquittal come to by the Jury.

Accordingly, we must decline to interfere in this case, and we direct that the record be returned to the Additional Sessions Judge.

With regard to the concluding paragraph of the Additional Sessions Judge's order of reference, we observe that, by Section 430, Code of Criminal Procedure, the Court of Session is to communicate the fact of the acquittal, and the circumstances under which the order was passed, to the Local Government.

As to the former sentence of transportation for life for child-murder, we observe

that the prisoner, when he committed that murder, was held to have been sane, and that no appeal was preferred against the sentence.

The prisoner is admittedly sane now, and it is not suggested that he is of such a dangerous character as to render his special detention necessary. We do not, however, consider ourselves bound to give any opinion on this part of the case.

The 19th March 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Breach of the peace—Lawful act—Act XXV. of 1861, Section 282.

(Miscellaneous Case.)

Kashi Chunder Dass, *Petitioner*,

versus

Hurkishore Dass, *Opposite Party*.

Baboos Chunder Madhub Ghose and *Rash Behary Ghose* for the Petitioner.

Baboos Doorga Mohun Doss and *Nullit Chunder Sen* for the Opposite Party.

The words "or to do any act that may probably occasion a breach of the peace" in Section 282, Act XXV. of 1861, were construed to mean a wrongful act, and not one which the person may lawfully do. It was not intended that a person should be prevented by a Magistrate from exercising his right of property, because another person would be likely to commit a breach of the peace, if he did so.

Couch, C. J.—THE petitioner, Kashi Chunder Dass, has been required to enter into a bond in the sum of Rs. 500 to keep the peace for the period of one year at the instance of Hurkishore Dass. It appears that the premises of the two adjoin. Kashi Chunder wishes to build a side-wall of a building upon his own ground, and Hurkishore objects to his so doing, because he anticipates that the dripping from the roof of the building, when completed, will fall on the thatch of his house. It is not alleged that Kashi Chunder is encroaching on Hurkishore's land. The Deputy Magistrate appears to think that the raising of the wall by Kashi Chunder may occasion a breach of the peace; but if such a breach of the peace were probable, Hurkishore would be the party to blame and the wrong-doer, as he is not authorized to interfere with Kashi Chunder's lawful use of his own property. It is true that Section 282 of Act XXV. of 1861 invests magisterial officers with large powers of interference in any matter where a breach of the peace is considered by them likely to occur, but great discretion is required in the exercise of those powers.

The effect of the Deputy Magistrate's order is to prevent Kashi Chunder from building this wall at all; for if, after the termination of the year, Kashi Chunder attempts to raise the wall, his neighbour will re-prevent his so doing as an act that may probably occasion a breach of the peace, and will obtain a fresh order for security. To avoid such a consequence as this, we must construe the words "or to do any act that may probably occasion a breach of the peace" as meaning a wrongful act, and not one which the person may lawfully do. It was not intended that a person should be prevented by a Magistrate from exercising his rights of property, because another person would be likely to commit a breach of the peace if he did so. We think that the order of the Deputy Magistrate should be quashed, and the bond be cancelled.

The 20th March 1873.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges*.

Theft—Fish—Navigable river—Act XLV. of 1860, Section 378.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Nuddea.

Hurimoti Moddock

versus

Deno Nath Malo and others.

The taking fish in that portion of a navigable river over which a right of julkur exists in another person does not fall within Section 378, Penal Code.

Order passed by the Joint Magistrate.

I BELIEVE that the subject-matter of this petition is true, but in the absence of any fishery-law do not see how the accused are punishable. The fish taken cannot be said to have been in any one's possession, and so cannot have been the subject of theft; criminal trespass has not been committed, for the river is public. I am obliged to reject the complaint.

Further remarks by the Joint Magistrate.—I have no further remarks to make than are

contained in my order rejecting the complaint.

It is to be noted that the fishery is in a navigable river of running water, which is open to the public. I do not see that the recognition of the fishery or of fishery-rights generally by Government affects the question. I should have dismissed the complaint, if preferred at the instance of Government also.

An analogous complaint in England is cognizable only under special game or fishery-laws, not under common law.

Remarks by the Sessions Judge.—I am of opinion that the Joint Magistrate's order in this case is not correct, and should be set aside. I do not allude to the merits of the case, for it has not been gone into, but julkur-rights are rights recognized by Government; and indeed the julkur regarding which this case arose is one of those the right to which Government has lately relinquished to its proprietor. As it appears to me that the theft of fish might well occur in such julkur, I would recommend that the Joint Magistrate's order be set aside, and that he be directed to try the case on its merits.

Judgment of the High Court.

Pontifex, J.—We are of opinion that the taking fish in that portion of a navigable river over which a right of julkur exists in another person does not fall within Section 378, inasmuch as the fish in such a river cannot be said to be in the possession of the proprietor of the julkur-right. The decision of the Magistrate will, therefore, be upheld.

The 22nd March 1873.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Accomplice—Evidence—Act I. of 1872, Section 133.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of committing theft.

The Queen

versus

Koa and others, *Appellants.*

Under Section 133 of the Evidence Act, I. of 1872, a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice.

THE appeal is rejected. Under Section 133 of the new Evidence Act, an accomplice is a competent witness against an accused person, and a conviction would not be illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice.

It is true that, under Illustration (*b*) to Section 114 of the same Act, the Court may presume "that an accomplice is unworthy of credit unless he is corroborated in material particulars;" but in this case I am of opinion that there is corroboration in material particulars; and, after reading the whole of the evidence both before the Sessions Judge and the Deputy Magistrate, I have no doubt of the prisoner's guilt. I reject the appeal.

The 28th March 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Breach of the peace—Recognizances.

(Miscellaneous Case.)

Zearuddin Howladar, *Petitioner.*

Baboo Doorga Mohun Dass for the Petitioner.

A person was bound down under recognizances to keep the peace towards all Her Majesty's subjects for a period of one year. Some time afterwards, he wrongfully confined and extorted a sum of money from two ryots, who were supposed to have committed theft on his lands, he being for such offence fined, and his recognizances forfeited.

HELD that the matter ought to have ended with the fine. For, the ryots not having offered any resistance, no breach of the peace took place, and the amount of the recognizances could not be taken.

Glover, J.—WE think that this order of the Deputy Magistrate must be set aside. We consider, moreover, that the Judge himself might very properly have referred this case for the orders of this Court. The petitioner had been bound down under recognizances in the sum of Rs. 1,000 to keep the peace towards all Her Majesty's subjects for the period of one year. Sometime afterwards, he is shown to have wrongfully confined two men, who were supposed to have stolen some Hooglah leaves from his chur, and after thus confining them to have extorted Rs. 9 from them as a sort of fine for taking away these leaves. He was convicted in that case and fined Rs. 50, and the matter should have ended there. How the fact of his having confined these two men and extorted from them Rs. 9 could lead to any likelihood of a breach of the peace, the Magistrate does not say. The Judge seems to

think that, although the two men took their arrest quietly, still they might have resisted, and this might have led to a breach of the peace. It does not seem at all probable that two poor ryots, on being arrested by a man in the position of the petitioner, would be likely to do anything that would lead to a breach of the peace, but anyhow there is the fact that no breach of the peace, nor any attempt at it, did take place, and under such circumstances the amount of the recognizances could not, with any show of justice, be taken from the petitioner. The order of the Deputy Magistrate must be reversed. The money, if received from the petitioner, will be returned to him, and he will remain in the same position as he was before, namely, under recognizances of Rs. 1,000 to keep the peace for one year.

The 22nd March 1873.

Present :

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Procedure—Preliminary enquiry by the Magistrate in cases triable by the Court of Session —Discharge of accused—Sections 202, 207, and 225, Code of Criminal Procedure (Act XXV. of 1861).

(Miscellaneous Criminal Case No. 9 of 1873.)

Rajah Nilmonee Singh Deo Bahadoor, *Petitioner,*

versus

Ooma Churn Roy and another, *Opposite Party.*

The Advocate-General and *Mr. R. T. Allan* and *Baboo Opendro Chunder Bose* for the Petitioner.

Mr. W. Jackson and *Baboo Sham Lall Mitter* for the Opposite Party.

Baboo Juggodanund Mookerjee for the Government.

Where a Deputy Commissioner held a proceeding in which the accused was charged with forgery and using a forged document, and after calling on the accused during the enquiry to make a statement, but without calling on him to make any further defence, and after hearing the whole evidence both for the prosecution and for the defence, discharged and acquitted the accused :

HELD that there had been no trial, but that this was a proceeding under Chapter XII. of Act XXV. of 1861; that, under Section 202 of that Act, the Magistrate had discretion to examine the accused, and under Section 207 to examine witnesses on behalf of the accused, and under Section 225, the Magistrate, when finding there was no sufficient ground for committing the accused to the Sessions, was competent to discharge and acquit him.

Kemp, J.—On the 14th of January last, Justices Phear and Ainslie sent for the record of this case, after giving notice to the defendants, to the Government pleader, and to the Deputy Commissioner. It appears that a petition was presented by the pleader for Rajah Nilmonee Singh Deo Bahadoor to the effect that the Deputy Commissioner, Colonel Rowlatt, who held the preliminary enquiry in this case, had no jurisdiction to try an offence under Sections 465, 471, and 409 of the Indian Penal Code without the aid of assessors; 2nd, that the Deputy Commissioner, having held a preliminary enquiry on a charge of forgery, and also of having used a forged document, knowing the same to be forged, which offences are exclusively triable in the Sessions Court, had no jurisdiction to try and determine the case, and acquit the accused Rughoomonee Odhicarry; 3rd, that, as the Deputy Commissioner admits that there is strong evidence against Rughoomonee, he was bound to commit him to the Sessions for trial; 4th, that the contradictory statements of Rughoomonee, with reference to the disposal of the sum of Rs. 507-6, which forms the subject of the charge, had not been noticed by the Deputy Commissioner. These four grounds refer to Rughoomonee. The 5th ground refers to Ooma Churn Roy alone, and is to this effect, that the Deputy Commissioner was wrong in discharging Ooma Churn Roy under Section 225 of the Criminal Procedure Code, instead of committing him to the Sessions Court for trial, inasmuch as there was sufficient legal evidence, both oral and documentary, to establish a *primâ facie* case against him. There is a 6th ground, to the effect that the Deputy Commissioner was wrong in holding that offences which come under Sections 465, 471, and 409, could not be prosecuted by an agent; but this point was given up in the Court below, as the accused stated that he did not wish to rely for his defence upon any such technical grounds, and the Deputy Commissioner proceeded to make the enquiry, although he was of opinion that the prosecution in this case ought to have been on the part and in the name of the Rajah.

We now come to the case itself. The case was instituted by one Koylash Chunder Bose, who states that he is a clerk of Mr. Michael Dutt. How this Koylash Chunder Bose is connected with the Rajah, we fail to see. However, it may be that, Mr. Michael Dutt being the law-agent of the Rajah, this Koylash Chunder Bose may be, as he states, a clerk in the employ of Mr. Michael Dutt.

The charge was made on the 24th of June 1872 against Rughoomonee alone for the criminal misappropriation of Rs. 507-6. It is stated in the first deposition of Koylash Chunder Bose that Rughoomonee was the general mookhtar of the Rajah, and in that capacity applied for and obtained from the Collectorate a sum of Rs. 507-6, which was standing in deposit in the name of the Rajah, and appropriated it to his own use. Koylash Chunder Bose goes on to say that the money was not paid to the Rajah, because it did not appear in the accounts rendered by Rughoomonee to the Rajah that any such sum had been entered as paid to the Rajah. On the same day, Rughoomonee was examined; he was not put on his defence, but he was simply examined. Under Section 202 of the old Code of Procedure, which governs this case, the Magistrate has discretion, from time to time, during the course of the enquiry, to examine the accused person. On the 24th of June, therefore, on the complaint of Koylash Chunder Bose being made, Rughoomonee was examined, and he candidly admitted the receipt of the Rs. 507-6, and further says that he had spent a small portion of the money, namely, Rs. 7-6, in miscellaneous charges connected with the Rajah's business, and that he remitted the balance of Rs. 500 to the Rajah, and got a receipt in the shape of a sunnud, which he filed in Court; he further stated that, if the late dewan of the Rajah, who was in the employ of the Rajah at the time the sunnud was granted to him, was examined at once, he would support his statement. Upon this, the Court sent for the late dewan of the Rajah, the witness Heera Chand Banerjee, who was examined on the same day, namely, on the 24th of June, and he entirely supported the defendant's statements. Subsequently, on the 23rd of July 1872, Koylash Chunder Bose makes another statement, and in this he charges, not only Rughoomonee, but also Ooma Churn Roy, who appears for the first time on the stage, with offences under Sections 119, 409, 201, 204, 465, 471, 109, 166, 167, 406, 407, 417, and 418 of the Indian Penal Code, or under thirteen different Sections. Now, we may observe, amongst these Sections there is one, namely, Section 407, which is entirely inapplicable to the case; that Section refers to cases of criminal breach of trust by carriers, warehouse-keepers, and the like; and it cannot be said that the alleged acts of the accused could possibly come under that Section. We mention this to show that Koylash Chunder Bose appears to have ransacked the Penal Code for Sections under which he could possibly bring a charge against the accused. Upon this second charge being made, a number of witnesses were examined for the prosecution on various dates, namely, on the 2nd, 22nd, 23rd, and 25th of July, and 19th and 20th of August, and 10th September. On the whole, we find that 25 witnesses were examined for the prosecution. On the 11th of September, or the day after the evidence for the prosecution had closed, the Deputy Commissioner held a proceeding in which he states that he is clearly and decidedly of opinion that nothing whatever had been proved against Ooma Churn Roy, that the evidence for the prosecution altogether failed to connect him with the misappropriation of the money, if such ever took place, and therefore, under Section 225, the Deputy Commissioner discharged Ooma Churn. With reference to the accused Rughoomonee, the Deputy Commissioner observes that he thinks that a "*primâ-facie*" case has been made out to put him on his defence on a charge of misappropriation, and also of having uttered a false sunnud purporting to contain a receipt for the money. On the 11th of September, the same day on which this proceeding was held, a charge was drawn up against Rughoomonee, not under any Section referring to the offence of uttering a forged document, but simply under Section 403, although that Section was not one of the Sections under which Koylash Chunder Bose had brought the original or the supplemental charge, and Rughoomonee was called upon to answer a charge under Section 403. The witnesses for the defence were examined on the 22nd and 25th of September, and 1st of October; and on the 1st of October, without calling upon Rughoomonee for any further defence, the Deputy Commissioner held a proceeding which is headed, Koylash Chunder Bose *vs.* Rughoomonee, and the same charges, strange to say, which are made in the second statement of Koylash, are inserted in this proceeding, although a formal charge under Section 403 had alone been made. The Deputy Commissioner, after carefully going through the whole of the evidence, comes to the conclusion that the money, although received, which was admitted by Rughoomonee, from the Collectorate, was paid to the Rajah, and that the sunnud, in support of the plea of payment which had been produced by Rughoomonee, at the earliest stage of the case, was not a forgery. He, therefore, acquitted and dis-

charged Rughoomonee. This Court has now been asked to hold that the Deputy Commissioner had no jurisdiction in this matter, inasmuch as the offence of uttering a forged document was an offence not triable by him, or, if triable by him, one which ought to have been tried by the aid of assessors. We are of opinion that there has been no trial in this case. The proceedings of the Deputy Commissioner were proceedings under Chapter XII. of the old Procedure Code, that is to say, proceedings preliminary to committing, or not committing, the accused to the Sessions. If this had been a trial by the Deputy Commissioner, then Rughoomonee would have been put upon his defence, which was never done during the whole course of the proceedings. All that was done, as already observed, was to call upon Rughoomonee, which the Court had discretion to do from time to time, to make a statement. The Court below, the Deputy Commissioner, having heard the whole of the evidence, both for the prosecution and for the defence, without calling upon Rughoomonee to put in any further defence, discharged and acquitted him. Under Section 207 of the old Procedure Code, the Magistrate had discretion to examine witnesses offered on behalf of the accused, and under Section 225 of the same Code, the Magistrate, when finding there was no sufficient ground to commit the accused to the Sessions, was competent to discharge and acquit. We, therefore, think that we ought not to interfere in the case of Rughoomonee, although we think that Mr. Paul, who appears for the private prosecutor, the Rajah of Pachete, was entitled, inasmuch as two learned Judges of this Court had sent for the record, to be heard in the matter of Rughoomonee.

A great deal has been made in this case, although we are not in any way trying the case on its merits, that the name used in the receipt is that of one Radhica Pershad Singh, and not of the Rajah, but in this matter we may observe that, although there is the fact that this name is mentioned, and not the name of the Rajah, who was entitled to the money in deposit in the Collectorate, it appears that the receipt was given "marfut" or "through" Rughoomonee, and therefore, whether the name of Radhica Pershad Singh was a mistake or not, and the Deputy Commissioner finds it was a mistake, there was evidently no attempt on the part of Rughoomonee to conceal his part in the transaction.

With reference to the second accused, Ooma Churn Roy, this party was charged only under Section 403, which refers to an offence triable by the Deputy Commissioner. The Deputy Commissioner, as already stated, after hearing the evidence for the prosecution, discharged Ooma Churn under Section 225 of the old Code, on the 11th of September.

We are of opinion that, in the matter of Ooma Churn Roy, Mr. Paul is not entitled to be heard by this Court. Under the provisions of Section 297, although this Court has the power to order an accused person, who has been improperly discharged, to be tried, or committed for trial, we do not think that this is a case in which we ought to exercise the powers of revision vested in us by that Section; nor do we think, looking to the conduct of the prosecution and to the whole case, that this is a case in which a private prosecutor has any right to be heard in this Court. We, therefore, decline to hear anything on behalf of the private prosecution against the discharge of Ooma Churn Roy.

The 1st April 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Confession to a police-officer—Section 27, Act I. of 1872.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of committing murder.

The Queen

versus

Pagaree Shaha, *Appellant.*

Mr. M. Ghose and *Baboos Doorga Mohun Dass, Nullit Chunder Sein,* and *Hari Mohun Chukravarti* for Appellant.

The accused made a confession to a Police Inspector, part of which related to the concealment of certain jewels, and, in consequence of the information so received, the jewels were discovered.

HELD that, under Section 27 of the Evidence Act, that part of the accused's confession which described his assault on the deceased, and her consequent death, and the way in which he became possessed of the jewels, related distinctly to the fact of the discovery of the ornaments, and might be proved against the accused.

Glover, J.—I THINK that we ought to affirm this conviction.

It has been contended by Mr. Ghose, on behalf of the prisoner, that the Sessions Judge improperly admitted against the prisoner evidence of a confession made by him to the Police Sub-Inspector; that the rest of the evidence against the accused is not absolutely inconsistent with his defence before the committing Magistrate; that there is

proved enmity between the prisoner and Nikaree Sheikh, the deceased woman's husband; and that the medical evidence shows that the injuries found on the corpse might have been caused by a fall.

First, as to the prisoner's confession before the Police Inspector, Section 27 of the Evidence Act, which re enacts in almost similar words Section 150 of Acts XXV. of 1861 and VIII. of 1869 (the old Codes of Criminal Procedure), says that, "when any fact is "deposed to as discovered in consequence of "information received from a person accused "of any offence in the custody of a police-"officer, so much of such information as re-"lates distinctly to the fact thereby dis-"covered may be proved."

Now, the accused stated to the Sub-Inspector, and the fact of his statement has been clearly proved, both by the evidence of witnesses and by the accused's own admission to the Deputy Magistrate, that he had seized Khatu Bibee (the deceased) by the neck, and pushed her forcibly down, so that she fell against a plantain-tree, and broke her neck; that he also struck her with his hand; that the woman then and there died; and that he then, after endeavouring to remove the body, took from off it a necklace and pair of bracelets, which he concealed in the neighbouring jungle.

In consequence of this information, the accused was taken to the jungle pointed out by him, and he then produced, from a concealed place, the necklace and bracelets before spoken of, saying that they were the ornaments he had removed from the body of Khatu Bibee.

It appears to me that that part of the accused's information which described his assault on Khatu Bibee and her consequent death related distinctly to the fact of the discovery of the ornaments, which discovery was made in consequence of that information; and that the prisoner's admission as to the way in which he became possessed of those ornaments was a fact which the Law of Evidence allowed to be proved against him. That it has been proved in this case, I have already shown.

That Khatu Bibee died, under the circumstances stated in the prisoner's admission before the police, is consistent with the medical testimony, which shows that the woman had a mark as of throttling on the front part of her neck, besides other injuries, the result of blows or kicks. Had the deceased committed, or tried to commit, suicide by hanging, and then had fallen from the branch of a tree, as suggested by Mr. Ghose, there would, of course, have been marks of the rope round her neck, and other signs which could not have been mistaken.

It is proved that there was ill-feeling between the prisoner and both the deceased and her husband, but this cuts both ways; it is proved that, on the day in question, the deceased went to the prisoner's house for the purpose of buying a Pooar tree; it was admitted by the prisoner before the Deputy Magistrate, and proved by his wife, that he accompanied the deceased to some jungle, near his house, for the purpose of showing her the tree in question. It is proved that the prisoner shortly after returned to his house alone, and that the woman was never seen afterwards alive. It is proved that, on the day after her death, the prisoner was found in the possession of two bracelets and a necklace, which were on the woman's person, when she was seen going to the prisoner's house on the Monday.

Taking all the circumstances into consideration, I have no doubt, in my own mind, of the prisoner's guilt, and I would reject his appeal.

Kemp, J.—I am of the same opinion.

The 17th April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie.

Judges.

Acquittal—Procedure—Act X. of 1872, Section 212.

(Criminal Motion.)

J. G. Bagram, *Petitioner.*

Mr. R. T. Allan for the Petitioner.

Where the Magistrate dismissed a case in the exercise of a judicial discretion, such dismissal, by Section 212, Act X. of 1872, has the effect of an acquittal of the accused person. The Court has no jurisdiction to entertain any application to interfere with the acquittal of an accused person, except the application be made either by Government, or under the sanction of Government.

Phear, J.—It seems to me very clear that in this case Mr. Bagram's complaint was rightly or wrongly *dismissed* by the Magistrate in the exercise of a judicial discretion. The consequence is that, by the operation of Section 212 of the new Criminal Procedure Code, the dismissal had the effect of an acquittal of the accused person. And we have no jurisdiction to entertain any application to interfere with the acquittal of an accused person except the application be made either by Government or under the sanction of Government. The present application must, therefore, fail.

The 16th April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Procedure—Right of cross-examination of witnesses for the prosecution—Act X. of 1872, Sections 218, 286, and 362.

(Miscellaneous Criminal Case No. 73 of 1873.)

J. R. Belilios, *Petitioner,*

versus

The Queen,

on the Prosecution of Kali Doss Banerjee, *Opposite Party.*

Messrs. W. Jackson and *S. J. Leslie* for the Petitioner.

The Legal Remembrancer for the Prosecution.

When the charge has been framed, and the defendant put on his defence, he has a right, under Section 218 of the Criminal Procedure Code (Act X. of 1872), to have the prosecutor's witnesses recalled for the purpose of cross-examination.

The claim to recall the witnesses for the prosecution is very different from the request made by the accused person to summon a witness under Section 362, Act X. of 1872.

No appeal lies to the Sessions Court from the order of the Deputy Magistrate refusing to recall the witnesses for the prosecution for the purpose of cross-examination, but the order is such an error as cannot be immediately corrected except by the interposition of the High Court under its powers of superintendence and revision.

Phear, J.—HAVING regard to the circumstances which have been made apparent to us on this record, we think that the Deputy Magistrate undoubtedly committed very material error in procedure by withholding from the defendant the right of cross-examination which he had under Section 218 of the present Criminal Procedure Code. It now seems to be clear that the examination-in-chief of the witnesses put forward by the prosecution, or on behalf of the prosecution, did not come to an end until the 17th March. Up to that time no charge had been framed against the defendant, and he had, therefore, declined (as he was entitled to decline) to cross-examine the several witnesses for the prosecution. On that day, however, when the charge was framed, and the defendant was called upon for his defence, he simply said that he was not guilty, and thereupon claimed the right to have the prosecutor's witnesses recalled for the purpose of cross-examination. The Deputy Magistrate was of opinion that simply pleading not guilty to the charge was not making a defence to the charge within the meaning of Section 218, and that consequently the defendant had no right to cross-examine the prosecutor's witnesses.

It appears to me that the Deputy Magistrate on this point fell into a very grave error indeed. For the consequence of it, if carried into effect, would be that the defendant would be tried, and be liable to be convicted, upon the one-sided testimony of the witnesses for the prosecution, without having that testimony sifted, analyzed, and tested by cross-examination as he desired, and as he certainly had a right to have it by our rules of trial-procedure, and by the express words of this Section, as I understand them, before he could be rightly convicted upon that evidence. It would certainly, as it seems to me, be most unfair to him that he should be obliged to run this risk, notwithstanding that he desired to cross-examine the witnesses, for every one knows that the testimony of even the most honest witness may be most materially altered by cross-examination, not only in regard to what the witness has actually said in chief, but also in way of supplementing that with additional information, and so bringing in new matter favorable to the defendant.

The words of Section 218 are: "If the "accused person have any defence to make "to the charge, he shall be called upon to "enter upon the same, and to produce his wit-"nesses if in attendance, and shall be allowed "to recall and cross-examine the witnesses "for the prosecution."

It seems to me that a man makes as good a defence as he possibly can make if he says that he is not guilty of the act charged against him, and proves by cross-examination

of the plaintiff's witnesses that that assertion is correct. On this ground, I am of opinion, as I have already said, that the Magistrate fell into very grave error when he refused to allow the defendant upon the plea of not guilty to cross-examine the witnesses who had already been produced on behalf of the plaintiff.

The claim to recall them for the purpose of cross-examination appears to me clearly very different from the request to summon a witness made by the accused person, which is the subject of the latter Clause of Section 362.

Mr. Bell urged very forcibly in view of this Clause that the Magistrate's refusal to call the witnesses for the prosecution for cross-examination was really a refusal to summon witnesses named by the accused person, and that consequently the Magistrate would thereupon be bound by the words of the Section to record his reason for the refusal, and the accused person would be entitled to appeal to the Court of Session against the refusal, and ought to go to that Court by appeal, instead of coming to this Court in the way the petitioner has done. But it appears to me that this is not so, and that no appeal against the Deputy Magistrate's refusal did lie to the Court of Session. It seems to me, therefore, that the error into which the Deputy Magistrate has fallen was such an error as could not be immediately corrected except by the interposition of this Court in the way in which our powers have been invoked. And we certainly do not think it was the intention of the Legislature that, when an error of this kind has been committed, the accused person should be forced to wait for remedy until all the proceedings had culminated in a conviction, which would enable him to proceed by appeal to a superior Court in regular course.

I have said it appears to me that there is no other course by which the defendant could get an immediate remedy excepting by coming up to this Court, for this is, as Mr. Bell rightly urged upon us, an interlocutory matter, and Section 286 of the Criminal Procedure Code expressly says :—

"No appeal shall lie from any judgment, "sentence, or order of a Criminal Court, "except in the cases provided for by this Act, "or by any law for the time being in force." Also as one of the illustrations of this Section we find further: "There is no "appeal against an interlocutory order, such as "a claim to appear by agent."

Consequently, it seems that the only possible ground upon which the right to appeal in this particular instance could be placed was that taken up by Mr. Bell under the provisions of Section 362, which, as I have already said, fails him.

On the whole, then, I think, we are bound to send back this record to the Deputy Magistrate, and to direct him to give the defendant a fair and reasonable opportunity to cross-examine the witnesses who appeared for the prosecution, and to proceed with the case in due course.

We have been asked by the learned Counsel who appeared for the petitioner to transfer this record to some other Court for the purpose of completing the trial. But we think that the ground upon which this particular part of the application is based are not sufficient to justify us in according to it. It appears to us that there is nothing on this record which ought to lead us to the conclusion that the Deputy Magistrate has formed an unfair bias against the defendant, and will not give him a fair trial if he is charged with the conduct of the remainder of the proceedings. It is, perhaps, to be regretted that the Deputy Magistrate found himself under the necessity of directing charges of perjury to be made against some of the witnesses for the prosecution before the whole of their testimony in the case had been given. But I can conceive it quite possible that the witnesses had laid themselves open to such a charge, and that it was rightly made even at this the earliest stage of the proceedings. And I can by no means assume that the course which the Deputy Magistrate has taken in this respect is indicative of any motive to press unfairly against the defendant. I therefore think that the order simply ought to be that which I have already expressed. The record should be sent back to Moulvie Abdool Luteef, the Deputy Magistrate, in order that he may conduct the remainder of the trial. We will add this, that we think the case ought to be taken up as promptly and proceeded with as speedily as possible.

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The 16th April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Withdrawal of complaint—Acquittal—Act X. of 1872, Section 272.

Criminal Revisional Jurisdiction.

Luchi Behara

versus

Nityanund Doss and others.

The withdrawal of a complaint by the complainant operates as an acquittal, and the High Court has no authority to entertain the matter at all, except upon an application duly made with the sanction of the Government.

The order of the Deputy Magistrate.

THE defendants having cleared themselves by oath, and complainant having agreed to abide by their oath and pay costs, I dismiss the case and discharge defendants, and direct, under Section 270, Procedure Code, that complainant pay Rs. 2 compensation to each of the defendants. Raghub Nyak witness will be disposed of in a separate proceeding.

On a revision of the criminal statements of Cuttack for the 4th quarter of 1872, the High Court called for the proceedings and an explanation from the Deputy Magistrate in the above case, and the following is the explanation furnished by the Deputy Magistrate:—

"The defendants were acquitted, under Section 272, Code of Criminal Procedure, on taking the oath, under Act VI. of 1872, tendered by prosecutor. The facts were reported in my No. 85 of 4th November 1872, as I have doubts of the legality of tendering oath to a defendant under the Oaths Act."

Judgment of the High Court.

Phear, J.—It seems to us that in this case the withdrawal of the complaint by the complainant, even though it was made under very peculiar circumstances, operated as an acquittal, and consequently we have no authority to entertain the matter at all except upon an application duly made with the sanction of Government.

Accordingly, we decline to interfere.

The 17th April 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Procedure—Act X. of 1872, Section 296.

Reference to the High Court, under Section 296 of Act X. of 1872, by the Officiating Magistrate of Moorshedabad.

Okhoy Teli

versus

Modhoo Sheikh and others.

When a Magistrate, having called on the prisoners for their defence, takes the evidence of a witness, and finally acquits them of the charge, the High Court has no power to interfere upon a reference made to it under Section 296, Act X. of 1872.

Phear, J.—IT appears to us that the decision of the Magistrate is an acquittal in substance as well as in form. He, having called upon the accused persons for their defence, takes the evidence of another witness afterwards, and finally acquits them of the charge. If this be so, we have no power to interfere upon this reference. And I may add that there is hardly sufficient disclosed to justify our interfering, even if it were merely a discharge instead of an acquittal.

The 17th April 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Discharge—Procedure—Act X. of 1872, Sections 296, 297.

Miscellaneous Case.

Prosunno Coomar Ghose, *Petitioner.*

Mr. M. L. Sandel for the Petitioner.

Bhaoo Juggodanund Mookerjee for Government Prosecution.

The High Court has the power, under Section 297 of Act X. of 1872, not only to order the accused to be tried, but also to be committed for trial, if it appear to the High Court that the accused was improperly discharged; but from the absence of the words "order him to be tried" in Section 296, it seems that a Magistrate is not empowered under that Section to direct a subordinate Court to take further evidence in a similar case.

Kemp, J.—THIS case having been sent for by this Court, the Court is competent, under Section 297 of the Criminal Procedure Code, if it considers that the accused person has been improperly discharged, to order him to be tried, or to be committed for trial. The objection taken by the pleader for the accused is that the Magistrate, under Section 296 of the Criminal Procedure Code, was not competent to direct the Deputy Magistrate to take further evidence in the case, and then to commit the accused person for trial before the Sessions Court. After hearing the argument of the pleader for the accused, this Court thought proper to take up the case under Section 297, and the whole of the evidence has been read to the Court. We are of opinion that the Deputy Magistrate's order discharging the accused was, with reference to the whole circumstances of the case, a proper order. The Court is also doubtful whether, under the provisions of Section 296, the Magistrate was competent to direct the Deputy Magistrate to take further evidence in the case, inasmuch as that Section directs, in the latter portion of it, that the Magistrate may direct the accused person to be committed for trial: but there is no provision for the Magistrate to direct the taking of additional evidence. This Court, under Section 297, has the power to order, not only the accused to be tried, but also that he be committed for trial, that is to say, that this Court, if it thinks proper, may order the accused person to be tried, which involves the taking of such evidence as may be necessary, before the accused party can be put on his defence, but the absence of the words "order him to be tried" in Section 296 seems to indicate that the Magistrate, under that Section, is not empowered to direct a subordinate Court to take further evidence in a case of this description.

On the merits of the case, the whole of the evidence has been read to us. We find that, in March 1872, or nearly one year before the charge was brought, the charge having been brought in January of the following year, late in the month, or the 24th, the complainant and the accused were, at the time the offence is alleged to have taken place, masters of a private school at Sulkea. It is alleged by the prosecutor that he lent one of his watches, not one of great value, Rs. 22, to the accused; that he asked him for the watch on several occasions, but that the accused put him off with excuses, and yet we find the prosecutor taking no steps whatever from March 1872 to January 1873, or for nearly a year until he hears from one Hurree Mohun Dass that the watch had been mortgaged by the accused to one Nistarinee, a widow, for a sum of Rs. 7. Upon this the complainant instituted proceedings against the accused. The defence of the accused was a frank admission of having received the watch from the complainant, and mortgaged it for the purchase of maps for the use of the school with the consent of the complainant. Nistarinee, the mortgagee, has been examined, and she states that the watch was mortgaged to her by the accused for Rs. 7: that the purpose for which it was mortgaged was stated to be for the purchase of maps for the school, and that, at the time of lending the money, she had no reason to suppose that the mortgage was made without the consent of the complainant. Looking, therefore, to the statement of the accused, and to the great delay and inaction on the part of the complainant, we think that no *primâ-facie* case at all was made out of dishonest misappropriation of the watch as against the accused.

We concur with the Deputy Magistrate in the opinion expressed by him. We direct that the accused be discharged, and that all proceedings in this matter, as far as the Criminal Courts are concerned, be stayed.

The 17th April 1873.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Powers of High Court under Section 287, Act X. of 1872—Evidence—Confessions—Act I. of 1872, Section 30—Procedure—Act XXV. of 1861, Section 205—Act X. of 1872, Sections 3, 4, 263, 297, 346.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of murder, &c.

The Queen

versus

Jaffir Ali and others, *Appellants.*

Messrs. Woodroffe and *Ghose* and *Baboo Rajaninath Bose* for Bhoobun Mohun Bose.

Baboo Doorga Mohun Dass for Nobo Sikdar.

Baboo Bussunt Kumar Bose for Jaffir Ali and Meher Ali.

Baboos Kali Mohun Doss and *Bykunt Nath Doss* for Dwarkanath Roy.

Baboo Juggodanund Mookerjee for the Prosecution.

Where a case is referred to the High Court under Section 263, Act X. of 1872, the Court is bound, under Section 288 of the same Act, to go into the facts of the case, although the conviction was by the verdict of a Jury.

The confessions of persons tried jointly for the same offence may, by Section 30, Act I. of 1872, be "considered" as against other parties then on their trial with them, but such confessions, when used as evidence against others, stand in need of corroboration, and cannot be used as corroborating in any way the evidence of approvers against such other parties

Section 30, Act I. of 1872, ought to be construed with great strictness, and the confession of one person is not admissible in evidence against another, although the two are jointly tried, if one is tried for the abetment of the offence for which the other is on his trial.

By Section 297 of the Criminal Procedure Code, the Court can deal with the case of a prisoner who does not appeal, and is authorized to pass such "order," sentence, or judgment, as it thinks fit.

THE following is a list of the prisoners with their corresponding numbers as referred to in the judgment: (1) Jaffir Ali, (2) Meher Ali, (3) Bhomur, (4) Hukum Ali, (5) Mohur Ali, (6) Jahir Ali, (7) Kashi Chunder Chuckerbutty, (8) Dwarkanath Roy, (9) Bhoobun Bose, and (10) Nobo Sikdar.

Glover, J.—THESE prisoners have been convicted by the Sessions Judge of Dacca on a trial by Jury.

Prisoners Nos. 1, 2, 3, 4, and 5, of dacoity with murder under Section 396, Penal Code.

Prisoner No. 6, of voluntarily assisting in the concealment of stolen property under Section 414, Penal Code.

Prisoner No. 7, of abetting the intentional omission to give information of an offence, &c., &c., under Sections 202, 109, Penal Code.

Prisoners Nos. 9 and 10, of abetment of dacoity with murder under Sections 396, 109; and prisoner No. 9, under Sections 202, 109 also.

The prisoner No. 8 has been acquitted by a majority of the Jury, but the Sessions Judge has referred his case under Section 263, Act X. of 1872 (Criminal Procedure Code).

The prisoners, Jaffir Ali and Meher Ali, have been sentenced to death. The prisoners Bhomur, Hukum Ali, Mohur Ali, Bhoobun Bose, and Nobo Sikdar, to transportation for life; Jahir Ali, to rigorous imprisonment for 3 years; Kashi Chunder, to six months' rigorous imprisonment with fine.

The case of Jaffir Ali and Meher Ali has been referred to us under Section 287, Code of Criminal Procedure; and by Section 288 of the same Act, we are bound to go into the facts of the case, although the conviction was by the verdict of a Jury.

In respect of the other prisoners (Dwarkanath excepted), the appeals are admissible on matters of law only (Section 271).

The prisoner No. 7, Kashi Chunder Chuckerbutty, has not appealed.

It will be convenient to take the case of each prisoner separately, and first as to Jaffir Ali. His petition of appeal contains various objections to the Judge's charge to the jury on the ground of misdirection, into which it is not necessary to enter more particularly, as the whole facts of the case are before us. Jaffir appears to have been found guilty, under Section 396, Penal Code, on his admissions to the Magistrate, on the evidence of the two approver-witnesses, on the confessions of the other prisoners, Meher Ali, Hukum Ali, and Bhomur, on the recognition of his voice by the witnesses, Deenoo Sing and Ramjye Sirdar, and by the finding of certain articles of stolen property in his possession. At first sight, this appears a very strong array of testimony against this prisoner; but, on a careful scrutiny, it resolves itself, I think, into little or nothing.

Jaffir Ali's admissions to the Magistrate have really nothing to do with the present case against him; all he said was, that some three months before, he had been sent for by the Thakorain (Hurrendro's wife, a girl of 13), and asked to kill Anunto, and that he had

refused. Two months later, and two or three days before Anunto's murder, he was again sent for, but declined going on the ground of illness.

Then as to the evidence of the approver-witnesses, Peeroo and Nitye. No doubt, their statements directly implicate Jaffir as being the principal agent in the murder, but then they contain many elements of doubt, and in any case they would require to be strongly corroborated before they could be safely used against the prisoner. The Sessions Judge very properly drew the attention of the Jury to the many and serious discrepancies between the depositions of Peeroo and Nitye; but he might also, and I think ought to, have noticed the great difference between Nitye's two statements before the Magistrate and the one made before the Sessions Court. The evidence of these men, Peeroo and Nitye, required, as I said before, the most satisfactory corroboration by unimpeachable evidence, for in some very important points their statements were hopelessly irreconcilable, and one or the other of them must have been false.

It was argued by the Government pleader, Baboo Juggodanund Mookerjee, that the confessions of Meher, Bhomur, and Hukum ought to be received as sufficiently corroborative of the approver's evidence; but this, I think, cannot be. Confessions of persons tried jointly for the same offence may, by Section 30, Act I. of 1872, be "considered" as against other parties then on their trial with them, but such confessions, when used as evidence against others, stand themselves in need of corroboration, and cannot be used to corroborate other evidence against parties not making confessions; tainted evidence is not made better by being doubled in quantity. The confessions of Meher, Bhomur, and Hukum cannot, therefore, be used as corroborating, in any way, against Jaffir Ali, the evidence of the approvers, Peeroo and Nitye.

Then as to the recognition of Jaffir by his voice at the Chillai River, of which a great deal was made by the Government pleader. No doubt, identification of a person by his voice is quite possible, and at night-time I should consider it a more trustworthy mode than seeing; but not only is there great discrepance in the evidence of Deenoo and Ramjye as to the part each took in the matter of this identification, as well as with regard to the time and circumstances of their making known their discovery to Baboo Hurrendro, but when information was sent to the thannah next morning, no names of suspected persons were mentioned, nor was Jaffir Ali implicated till many days after, although Baboo Hurrendro, according to his own account, knew of the recognition within a few hours at furthest after it was made, and before the police arrived. An endeavour has been made to explain this, but not, I think, a satisfactory one. Then it seems to me violently improbable that a man in full flight, after committing murder and robbery, and hotly followed by the household of the party robbed, should go out of his way to proclaim his identity to his pursuers, and that, too, in such a remarkable manner as Jaffir is said to have done.

I think it very doubtful, indeed, whether there was any pursuit of the dacoits at all, and I altogether disbelieve Deenoo and Ramjye's story as to their recognition of Jaffir Ali. The whole thing seems to have been an after-thought, and neither of the approver-witnesses, it may be noted, mention the circumstance.

Then as to the alleged finding of the property in Jaffir's possession, and this appears to me one of the most dubious parts of the case. Not only was the woman, Nekjan, unable to identify satisfactorily (I say this advisedly after a careful weighing of all her deposition) the property produced in Court as that which she took out of the tank, but the circumstances under which she produced it are, to my mind, in the highest degree suspicious. She says that Jaffir Ali's second or nika wife told her where the things were concealed; but this woman has not been examined. Between the finding of the anklets, on which day Jaffir Ali was arrested, and the discovery of the "cheek," Nekjan goes to Jydebpore, and puts up in the house of Kalee Narayan Rai (the person alleged by the prisoners to be at the bottom of this affair), then comes back apparently, for it is impossible otherwise to reconcile her statements, and produces the other ornaments. On being asked how it was that the second wife knew all about the property, whilst she did not, she declared that she did know all about the dacoity, having overheard her husband and Meher conversing on the subject, although she had not been told where the property was hidden; but, according to her own previous account, her husband had never spoken to her on the subject, and she never said anything about her other means of knowledge. Then the articles were found in an open tank, near, no doubt, to the prisoners' houses, but accessible to anybody: and it is shown by the evidence that, when

the anklets were produced from the tank, Jaffir was not present. That he gave up afterwards a pot containing money is proved and admitted by the prisoner himself, who said it was his own money, but it is also admitted that Jaffir is a man of some position and means, and there is nothing strange in his owning the amount given up by him.

I think it also very clear that Jaffir was not on good terms with Nekjan, his first wife. Doubtless, as the Judge says in his charge, no direct evidence of the fact has been given, but the answers of Nekjan to questions put by her husband show that he had suspected her for a long time of an intrigue with Deen Ali, the other witness to the giving up of the property, and there could have been nothing but ill-will, therefore, between the two. On the whole, this woman's evidence has left a most unfavorable impression as to her veracity on my mind, and there is much in it that looks like police-manipulation.

The only thing like corroboration of the approver's testimony that I can see in Nekjan's evidence is the circumstance of Jaffir Ali's being away from home on the night of the murder, and having the mark of a bruise or blow on his shoulder. The first point would depend on how far Nekjan's veracity or recollection are to be trusted; and as to the bruise on the shoulder, how the approver saw such a slight injury at night time and in the confusion of a hurried flight is not explained, but, taking this statement of the approver as it stands, the only corroboration of it in this particular is that Jaffir, the day after the murder, is said by his wife and Deen Ali to have had a mark or bruise on his shoulder. He accounted for it at the time, apparently, by saying that his gun had kicked whilst he was out shooting, and there is some evidence to the effect that he had been out shooting. Deen Ali's evidence on this point is very vague and unsatisfactory.

On the whole, therefore, and whilst admitting the very great suspicion which attaches to Jaffir Ali, and that there was a sufficient case against him to go to the jury, I cannot say that I am prepared to convict. Had there been any trustworthy evidence as to the finding of the property, or that his second wife had concealed it where it was found by Jaffir's orders, the hiatus would have been supplied, and the approver's evidence corroborated; but, as it is, I do not feel justified in affirming the conviction.

The case of the second prisoner, Meher Ali, is different. He is distinctly implicated by both approver-witnesses, and their statements are corroborated in many important points by certain admissions made by the accused before the committing Magistrate, and the first question to be decided is whether these admissions can be taken as evidence against him. It was argued on his behalf, and also for the other confessing prisoners, that the statements so made had not been regularly or properly recorded by the Magistrate, and were, therefore, inadmissible; and that, as they had not been taken at any stage of a "preliminary enquiry by a Magistrate," the omission of legal form and procedure could not be cured by the subsequent examination of the Magistrate who recorded those statements.

It appears that the Magistrate, Mr. Lyall, recorded the statement of Meher in English (he gives his reason for doing this in his deposition) on the 10th of December 1872. The old Procedure (Act XXV. of 1861), therefore, applies. Now, Section 205 of that Act supposes that the examination of an accused person is recorded in that person's own vernacular, for, after being recorded, it is to be read or shown to him, and he is to be at liberty to add to or explain his answers. The examination of Meher Ali on the 10th of December, therefore, was not according to law. The Magistrate in his certificate says, no doubt, that the examination was "read" to the accused in Bengalee, but this means, of course, translated to him in that language from the English in which it was originally recorded, and this was a very different thing from having his own very words in his own language read over to him. There are not many European officials in this country who could translate off-hand from the one language into the other well enough to make a common Bengalee chasa understand what was being said to him. The object of the law, I opine, was that a confessing prisoner should tell his own story in his own words, and then have those very words read over to him, so that he might be sure that nothing would be used against him beyond what he had actually said. It is, in my opinion, extremely important that an accused's *ipsissima verba* should be used on such occasions.

But it is said the Magistrate himself was examined on oath under the provisions of the latter part of Section 346 of the new Procedure Code, and that he swore positively that the whole of each accused's statement was carefully read over to him in his own language, Bengalee, and that each of the accused made such emendations and alterations as

he thought proper. This, no doubt, would have cured the original irregularity had that irregularity been committed after Act X. of 1872 had come into operation; the question is whether it will do so under present circumstances. Now, Section 3 of the new Procedure Code says that cases pending in a Criminal Court, when the Act came into force, *viz.*, January 1, 1873, are to be decided, as far as may be, according to the new Procedure. Now, this case was pending on the 1st of January 1873, and I think that the provisions of the last Clause of Section 346 of the Code may be fairly and reasonably applied to it. That Section says that, when a Court of Session finds that the examination of a prisoner has not been fully conducted according to law, it may take evidence that the prisoner duly made the statement recorded. No doubt, this permission refers to examinations taken under Section 346, but it may, I think, be also made to refer to the analogous Section of the old law, and gives the Sessions Judge power to clear up difficulties of this nature, whereby the prisoner is not prejudiced, by examining the officer who recorded the prisoner's statements as to the fact of those statements having been duly and intelligently made.

Now, Mr. Lyall, the officer by whom Meher's statement was recorded, swears positively that the English record was translated to the accused in Bengalee, and that he fully understood the purport of what had been recorded; he swears also that his record contained the whole of the accused's statement. I think that this is legally sufficient, and that the admissions of Meher Ali, although informally recorded in the first instance, may be used now as evidence against him. But were it otherwise, and if the recorded admission of the accused were considered inadmissible, there would still be the evidence of the Magistrate as to the fact of an inculpatory statement having been made to him, and this would be evidence which the Jury might consider as corroborative of the approver's testimony. These remarks apply, *mutatis mutandis*, to all the accused who made statements before the Magistrate, Mr. Lyall.

With regard to the second objection, I do not understand how the Magistrate's proceedings do not come under the definition of a "preliminary enquiry." An enquiry by Section 4, Code of Criminal Procedure, includes any enquiry which may be conducted by a Magistrate under the Act, and this enquiry was made by the Magistrate of Dacca with the object, if sufficient evidence was attainable, of committing the accused parties to the Sessions Court. It seems to me to come in every respect within the meaning of a preliminary enquiry by a Magistrate. It has been said that Meher Ali was induced to confess by the police, in the hope that, by so doing, he would be admitted as Queen's evidence. There is no proof of this, nor does Meher Ali himself say that this was the case. His answer before the Sessions Court was that the charge had been brought against him out of enmity, because he had made himself disagreeable to the Rai Bahadoor, that is, Baboo Kalee Narain Rai.

In his examination before the Magistrate he admitted going with the party to Buldah for the purpose of killing Anunto, but alleged that he took no part in the actual murder, but stayed outside the house whilst the others went in; he admitted the taking away of a box containing articles of jewellery, which he afterwards gave up to the Police Inspector. This statement is, of course, no corroboration of the approver Peeroo's evidence so far as that evidence details Meher Ali's part in the actual murder of Anunto, but it corroborates both approver's evidence so far as the previous conspiracy to murder Anunto, and the going of the prisoner to Buldah for that purpose.

It has been proved, moreover, by apparently respectable testimony, that Meher himself dug up from beneath the ground, and gave to the Inspector, certain articles of jewellery proved to have belonged to Anunto at the time of her death.

We have then the confessions of the prisoners Hukum Ali and Bhomur, which, as these accused were being jointly tried with Meher for the same offence, may be taken into consideration against him.

Lastly, the statement of the approvers regarding the wound received by Meher Ali during the dacoity is corroborated indirectly by the fact that, immediately after that affair, Meher was found with a wound in his side as described by the approvers.

As a matter of fact, whether Meher Ali's confession be admitted or not, there is other and ample corroboration of the approvers' evidence against him. And after full consideration of all the grounds urged in favor of this prisoner, I am of opinion that the Jury were right in convicting him. Under the circumstances, however, I do not think it would be right to inflict a capital sentence. He will be transported for life.

The remaining prisoners can appeal on questions of law only.

And first, as to the prisoners, Bhomur and Hukum, who have filed a joint-petition of appeal.

They object primarily to the Judge's adding fresh charges under fresh Sections of the Penal Code—an objection which is palpably untenable, the charges having been so altered before the prisoners were called upon to plead.

Their only tangible ground of appeal is that there was no legally sufficient evidence against them.

Now, that evidence consisted, *first*, of the depositions of the approver-witnesses, Peeroo and Nitye; *secondly*, of their own admissions to the Magistrate, which, for the reasons I have given in another part of this judgment, were, I consider, receivable as evidence against them; and, *thirdly*, of the statements made by other prisoners tried jointly with them for the same offence.

Hukum Ali did not confess to any complicity in the murder; he admitted being present when the crime was committed, but said that he had gone with the others for the purpose, as he was told and thought, of catching an asamee. Taking his confession as a whole, it amounts to no more than this.

The Judge seems to me to have put the case against these prisoners fairly enough before the Jury; he pointed out the general discrepancies in the approvers' evidence, and warned them to be careful how they accepted such evidence.

As a great deal was made of this point in the course of the argument, I think it as well to quote the words of the Judge regarding Peeroo and Nitye: "Then, gentlemen, a word "as to the evidence of the approvers. The "vakeels for the defence have said, and very "properly, that such evidence should be "regarded with very great distrust, and that "substantial corroboration of it should be "required, and especially as to the complicity "of individual prisoners; but, on the other "hand, you must not distrust the evidence of "approvers too much. You must remember "that the law does admit such evidence as "the basis of a conviction, even when uncor-"roborated; and while, on the one hand, you "should remember that the evidence of ap-"provers is, from its very nature, evidence "that ought to be received with great caution, "not only because those who give it admit "themselves to be men stained with fearful "crimes, but because it is also given under "circumstances of great temptation; those "who give it know as it were that their "necks are in the noose, and they are, therefore, "under great temptation to tell, not only what "they know to be the truth, but what they "think is required. Whilst you remember all "this, I say you must also remember that, in "many instances, it is the only evidence "available; and above all you must remem-"ber that what you have to decide is not any "abstract question of approvers' evidence, "but to pass an opinion on the evidence of "particular approvers, and you must view "their evidence as it is. You must consider "how far the statements of the approvers "are corroborated by other witnesses. When "uncorroborated, how far any of the witnesses "are likely to have been able to corroborate "them, and what degree of trust you can allow "to these statements standing, perhaps, un-"corroborated. You must consider, too, how "far the statement of the approvers tally with "each other, and, if they vary in some "points, how far you can trust them in the "points on which they agree. You must "consider how far the statements of the ap-"provers are consistent with each other, and "how far the facts deposed to by them are "likely to have come under their observa-"tion; in short, you must take those state-"ments as they are, corroborated or uncorro-"borated, consonant or dissimilar. You must "remember the special dangers of this sort "of evidence, and you must then pro-"nounce, not a platitude as to the evidence "of approvers generally, but whether you "believe, and how far you believe, the evi-"dence of the individual approvers who "have testified before you."

It appears to me that this was a fair and reasonable exposition of the law on the subject of approvers' evidence, and that with the Full Bench decision of this Court in the case of The Queen *vs.* Elahee Buksh,* that the uncorroborated statement of an approver-witness is evidence legally sufficient for conviction. The Judge was not bound to say more than he did. Moreover, since that decision was passed, the law has expressly provided for the contingency, and Section 133 of the Evidence Act lays it down that a "conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice."

I entirely concur in the remarks made by Mr. Justice Jackson in the case above referred to (5 Weekly Reporter, page 94) on the

* 5 W. R., Criminal Rulings, 80.

general incapability of Mofussil Juries to rightly appreciate evidence, unless they are very considerably aided by the Judge in his summing up; but to tell a Jury that they must not convict a prisoner on the uncorroborated evidence of an approver, when the law, as expounded by this Court, and laid down in the Evidence Act, says that they may do so, is, I think, to go beyond a Judge's province altogether; and yet this is what the appellant's Counsel says that the Judge ought to have done. I think that the Judge did all that was required of him when he solemnly warned the Jury of the danger of accepting the uncorroborated evidence of an approver, leaving it to them. at the same time, to say whether or not, under the circumstances of the case, the particular approver before them was or was not deserving of credit. These remarks apply specially to the case of Hukum Ali, for this prisoner made no confession in respect of either knowing of, or taking any part in, the projected murder of Anunto, and his statement, therefore, does not corroborate the evidence of Peeroo and Nitye. The confessions of Nuber Ali and Bhomur, however, could be considered against him under Section 30, Act I., 1872.

I do not think that, had I been trying the case of this prisoner with assessors, I should have convicted him, but I can see no misdirection to the Jury, and would, therefore, reject the appeal of Hukum Ali.

The approvers' testimony against Bhomur Ali was corroborated by his own very full confession made to the Magistrate, and there was also the confession of Meher Ali and Hukum Ali, which implicated him. There was certainly, as it appears to me, no misdirection on the Judge's part as regards this prisoner.

An objection was taken that the Judge ought to have pressed more particularly on the Jury the theory that Baboo Kalee Narain Rai was at the bottom of the affair, and had got up the case against the prisoners, but the Judge did bring the allegation very pointedly before the Jury. I do not think he could have done more; there was no evidence offered by these prisoners to prove their assertions, and there was nothing in consequence for the Judge to sum up. All that Baboo Kalee Narain did in this case, so far as it was stated in evidence, was stated to the Jury, and I do not consider that the Judge's statement of his opinion that Baboo Kalee Narain had only been doing his duty was a misdirection to the Jury, or operated in their minds to the prejudice of these accused persons. I see no reason to interfere with the finding of the Jury as regards Bhomur.

But, with reference to the sentence I propose to pass upon Meher Ali, I do not think it would be proper to visit these two men with such a punishment as transportation for life. Section 396, Penal Code, under which they have been convicted, allows of a lesser sentence, and ten (10) years' rigorous imprisonment in the case of each prisoner (Bhomur Ali and Hukum Ali) will, I think, be sufficient.

Mohur Ali made no confession, and the evidence of the approver-witnesses is uncorroborated as regards him. I would not have convicted him myself on such evidence, but, as in the case of Hukum Ali, I cannot say that the Jury who found him guilty did so in consequence of any misdirection on the part of the Judge. As in the preceding case, however, his sentence should be reduced to 10 years' rigorous imprisonment.

Jahir Ali has been convicted, under Section 414, Penal Code, of voluntarily assisting in concealing property which he knew to be stolen.

The ground of his appeal is that the evidence against him is not credible, and that Baboo Kalee Narain Rai has got up the case against him.

The Judge says as regards this prisoner: "The evidence of the Sub-Inspector Ramkoomar proves that the prisoner produced to him from a place of concealment the small brass box which has been identified as part of the stolen property, and also a pot of money. The witness Azim proves that he saw Jahir Ali bringing these articles, and before the Magistrate Jahir confessed to having done so, although he denied it before you." This prisoner, who is the brother of Meher Ali and Mohur, did confess to the Magistrate, no doubt, the fact of his concealing the property at the request of his brother Meher, just before the latter was arrested, but he nowhere admitted that he knew, or had reason to believe, the property was stolen property.

The Judge altogether omitted this most essential element from his charge to the Jury: he put it strongly to them that the prisoner was proved by his own confession and by the evidence of witnesses to have concealed property, but made no mention of the fact that it was necessary for the Crown to prove, either directly or inferentially, that Jahir knew the property to have been stolen. I think that this was an omission which decidedly prejudiced the prisoner's case to the Jury, and

at there was a clear misdirection which ould have the effect of nullifying the find-g. I do not, however, under the circum-nces, think it necessary to order a new al of this prisoner.

We now come to the Hindoo prisoners, oobun Bose and Nobo Sikdar, who have en convicted of the abetment of an offence nishable under Section 396, *i.e.*, dacoity th murder, and have been sentenced to nsportation for life. Bhoobun was also nvicted under Sections 202, 109, but no ntence was passed.

These prisoners are the head-amlahs of aboo Hurrendro Narayan, the former being s manager and also his brother-in-law.

Against Bhoobun, according to the Judge's arge to the Jury, was the identification by tye, the approver, at the Chillai River, ere the murder of Anunto was arranged r with Jaffir, and afterwards in the verandah Anunto's house; the unusual behaviour of oobun at the time of the dacoity; the pposed identification of him by his master, urrendro, as the person calling out to draw e bullet before the gun was fired; the ex-amation made by Jaffir that Bhoobun Bose d instigated the dacoity and murder, and e statements made by the confessing pri-ners.

The appellant objects, first, to that part of e Judge's charge which tells the Jury that s (Bhoobun's) unusual conduct at the time the dacoity is consonant with the theory his guilt, and the question is—Was any ch unusual conduct deposed to by the wit-esses? Hurrendro Nath and Deenoo Sing e the only witnesses who speak to the cir-amstance of Bhoobun's ordering the bullet be drawn, and the Baboo's evidence is al-gether inconclusive. He said no more an he thought it was Bhoobun; whereas, had e circumstance occurred, there could have een no reason for doubt at all. Bhoobun, cording to the other witnesses, was stand-g within a few feet of Hurrendro; and the ght is said to have been moonlight; there ould have been no difficulty in clearly entifying a person whom Hurrendro was in e habit of seeing and speaking to every y of his life. Deenoo's evidence on this oint is entirely different from that of Ramjye. he identification of Jaffir also by Deenoo nd Ramjye is, as I have before said, extreme-dubious, as are the circumstances under hich the fact was communicated to Hurren-ro Nath; and, on the whole, I do not think was right to say to the Jury that Bhoobun's nusual conduct at the time of the dacoity had been clearly established. The evidence did not warrant such a conclusion, whilst the decided opinion of the Judge had, I have no doubt, considerable weight with the Jury.

Then as to the identification by the approver, Nitye, at the Chillai River. The Judge very fairly and properly brought to notice the irreconcilable discrepancies between Peeroo and Nitye's evidence as regards the identification of Bhoobun; but he omitted one very essential point in favor of the accused by making no mention of Nitye's statement before the Magistrate. The Jury evidently, from their verdict, believed that, according to the Judge's supposition, Peeroo had intentionally declined to identify the man who came in the boat to arrange for the murder with the prisoner, Bhoobun, and believed the other approver, Nitye, who swore positively that Bhoobun was the man in question, and that both he and Peeroo had full opportunity of recognizing him.

Now, this man, Nitye, before the Magistrate, said as follows: "While we were there" (*i.e.*, at the Chillai River), "two men "came in a boat; Jaffir told me one was "Bhoobun Bose. I did not know him before. "He was similar to the Bhoobun Bose now "here."

And the Magistrate, in his grounds of commitment, admits that Bhoobun "was not fully identified by Nitye."

Before the Sessions Court, Nitye deposed as follows: "Two men came up with a "boat. I could recognize them if I saw them. "I am certain I could recognize them. I "identify the prisoner, Bhoobun Bose, as one "of them."

Now, considering that the strength of the case against Bhoobun was his alleged meeting with Jaffir at the Chillai River as proved by the witness Nitye, the Jury ought certainly to have been warned that this witness, when first examined as such, professed himself unable to identify Bhoobun satisfactorily, and, as a matter of fact, according to the Magistrate's statement, did not identify him. Had the Jury known this, they would hardly, I think, have attached much credit to Nitye's subsequent statement, that he could identify, and did identify, Bhoobun perfectly well. The Judge told the Jury on this part of the case, "You have also Nitye's distinct assertion "that Bhoobun Bose was one of the two men "who came to the river," thus leading them to the conclusion that there was no reason why Nitye's statement on this point should be disbelieved. In reality, there was very great

reason, and the Jury ought to have been told why.

Then as to the exclamation said to have been made by Jaffir to Peeroo. The approver states: "Jaffir Ali then said they have "called and taken us there, and done for our "lives. I asked who had done this; he said, "'Bhoobun Bose and Dwarka Rai.'" On this, the Judge in his charge said: "Now, "although this statement is rather obscure "in its terms, still it distinctly admitted that "the speaker had done something which "might cost him his life, and he plainly "connected Bhoobun Bose and Dwarka with "that act, and the statement is, therefore, I "think, admissible *pro tanto*."

It appears to me that this was no evidence at all against Bhoobun, and that the Jury were misdirected in being told to consider it as evidence. If the statement of A, that he heard B say that C had urged him to commit such and such an offence, is evidence against C, no one, it seems to me, would be safe. The new Evidence Act is comprehensive enough, without making it include statements of this sort.

As to the identification of Bhoobun in the verandah of Anunto's house at the time of the murder when he is said to have told Jaffir to finish his work quickly, the only evidence that I can see on the record is the statement of the approver Nitye. For none of the confessing prisoners mention the circumstance; nor, if they had done so, could their statements have been considered against Bhoobun. There was, therefore, against the accused on this part of the case only the uncorroborated evidence of the approver Nitye.

Under ordinary circumstances, we might not, perhaps, be able to interfere, because the Jury might legally have chosen to believe that uncorroborated evidence; but in the present case, I think, we are bound to do so. I am of opinion that the Judge's summing up to the Jury as regards this prisoner contained errors both of omission aud commission, and that the accused was most probably largely prejudiced thereby. The conviction should be quashed, and I would not order a new trial.

Then as to the prisonei Nobo Sikdar. He appeals chiefly on the ground that the Judge did not sufficiently impress the Jury with the evidence regarding Baboo Kalee Narain's complicity, nor with the fact that there was no motive for killing Anunto, arrangements having already been made for her departure from Buldah. That the statements of the confessing prisoners ought not to have been used against him, and that in any case there was no presumption that in planning a dacoity he had meant to abet murder.

The Judge says of this prisoner: "Lastly, as regards Nobo Sikdar, you have the "fact that he is shown to have had a private "conversation with two of the principal mur-"derers two days before the murder, and you "have Meher's statement before the Magis-"trate, which alleges distinctly that he insti-"gated and contrived the murder." There was, no doubt, evidence that Nobo, some two days before the murder of Anunto, had had an interview with Jaffir Ali in his own house, but this, although a matter of suspicion, would not necessarily connect the prisoner with the murder. The link was supposed to be found in Meher Ali's confession to the Magistrate, which the Judge directed the Jury to consider as admissible evidence against Nobo.

He says: "It is, no doubt, admissible "evidence against him, as every statement in "it affects both himself and Meher equally."

The Judge goes on, however, to warn the Jury that Meher's statement requires strong corroboration, and that it had not only not been corroborated, but was opposed by the evidence of other witnesses.

It seems to me that the statement of Meher was not admissible evidence against Nobo. Section 30, Act I. of 1872, introducing, as it does, an entirely new, and, I am inclined to think, rather dangerous, element in the conduct of criminal trials, ought to be construed with great strictness. Now, the words of the Section are: "When more persons than one "are being tried jointly for the same offence," and they do not fit the present case. Nobo and Meher Ali were, no doubt, being jointly tried; but it was not for the same offence, the one accused being tried for dacoity with murder, the other with the abetment of that offence. The confession of Meher, therefore, should not have been used against Nobo, and the Jury were misdirected so far. If this be eliminated, there is nothing but a vague suspicion against Nobo, for his visit to Jaffir might have been for a perfectly innocent purpose. Anyhow it cannot be said that the Jury were not induced to impute the worst motives to that visit by reason of the statement of Meher, which they were told was admissible evidence.

I would quash this conviction, and not direct a new trial.

Dwarka Nath Rai's case has been referred to us under Section 263 of the Procedure

Code; the Judge disagreeing with the majority of the Jury (5 out of 7), which acquitted the prisoner.

I have already, in other references of this nature, stated my opinion that the powers given by this Section should be very sparingly exercised, and that in no case should the High Court take action, unless it were conclusively shown that the Jury had given a perverse verdict in the teeth of the evidence, and that a failure of justice had been the result.

Now, this most certainly cannot be said of the present case. How the Jury concluded to acquit Dwarka, whilst convicting Bhoobun and Nobo, may be a matter for surprise, but I am certainly not disposed to interfere with the verdict as given. In fact, many of the reasons given for holding the Jury to have been misdirected in the case of Bhoobun and Nobo would have applied to the case against Dwarka.

There remains the conviction of Bhoobun Bose under Sections 202, 109, for which no separate sentence has been passed.

There was evidence that Bhoobun, Dwarka, and Kashi, when told that Jaffir had been recognized by his voice, told the woman Kalitara, who was proceeding to the police-station only to mention the fact, that dacoity with murder had been committed, and not to mention any names.

The Judge said to the Jury: "Now, "gentlemen, if you believe this evidence, I "think you must come to the conclusion that, "in sending this information to the thannah, "these prisoners caused a very material fact "to be suppressed."

And he told the Jury afterwards that, if they believed the evidence, "you can convict them" (*i. e.*, these three prisoners) "of "abetting the intentional omission to give "information;" and also that, under Section 138 of the old Code of Criminal Procedure (then in force), every one was legally bound to give information in the case of certain offences of which dacoity with murder was one, and he defined the word "information" to mean "full information, in fact every-"thing that a man knows about a crime, and "not a mere barren statement." The Judge also told the Jury that the suppression of Jaffir's name undoubtedly "tended to facilitate his escape."

The question here turns upon the meaning to be attached to the word "information." That Bhoobun and Kashi Chunder were aware that Jaffir was said to have been identified; and that, knowing this, they forbade his name being mentioned by the messenger they sent to the thannah, are questions of fact, on which the Jury pronounced adversely to the prisoners, and there can be no appeal against their verdict so far.

But I understand by "information" something which the person reporting knows, or has reason to believe, to be true, and not any vague surmises which the people around him may have put into his head. The recognition of Jaffir by his voice at the Chillai River was evidently a thing which was, at the best, very dubious, and, unless it were shown that Bhoobun had good reason to know that the man in question had been engaged in the murder, I do not think that his telling Kalitara not to mention any names would be sufficient to convict him of intentionally omitting to give such information as would have prevented Jaffir from being brought to justice. Information as to the occurrence was sent to the police-station at once, and the Inspector went to the place immediately, and commenced his enquiries.

I think that the Jury should have been told that the direction by Bhoobun not to mention any names, even if believed, would not bring him within the purview of Section 202, Penal Code, unless they also believed that he knew Jaffir to have been engaged in the murder, and this, I think, they probably would not have found, had the evidence against Bhoobun on the more serious charge been properly laid before them. I have already given my reasons for thinking that this evidence was not properly laid before them, and it follows that, in respect of Section 202 also, the Jury were misdirected.

I would quash this conviction also. There remains only the case of Kashi Chunder. This prisoner has not appealed, but under the circumstances we should be, I think, justified in treating his case under Section 297 of the Procedure Code. Now, there is no more evidence against Kashi Chunder than against Bhoobun, and I do not, as I have already said, consider that sufficient for conviction under Sections 202, 109 of the Penal Code.

By Section 297, Code of Criminal Procedure, we are authorized to pass such "order," sentence, or judgment as the Court thinks fit, and, I think, we ought to say that Kashi Chunder was improperly convicted, and should be released.

Kemp, J.—I concur in this judgment.

The 16th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Unlawful assembly—Rioting—Penal Code, Sections 141 and 142.

(Miscellaneous Criminal Case No. 10 of 1873.)

Birjoo Singh, *Petitioner*,

versus

Khub Lall and others, *Opposite Party*.

Mr. C. Gregory for the Petitioner.

Mr. R. E. Twidale and *Moonshee Abdool Baree* for the Opposite Party.

It cannot be said that a person intentionally joins an unlawful assembly, or continues in it, when it appears from the evidence that he went to the place where the members of the unlawful assembly were gathered to prevent mischief being done to his own property which he had a right to protect.

Couch, C.J.—THE petitioner has been convicted, under Section 148 of the Penal Code, of rioting, being armed with a deadly weapon, or anything which, used as a weapon of offence, is likely to cause death. In order to be guilty of the offence of rioting, the person must be a member of an unlawful assembly, and force or violence must be used by some member of the unlawful assembly in prosecution of the common object of it, or by the unlawful assembly. We must see whether the petitioner was a member of an unlawful assembly, and for that purpose we must look to Section 142 of the Penal Code, which says: "Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly." And the assembly is unlawful if the common object of it is one of the several matters set forth in Section 141.

There was here, no doubt, on the part of one set of persons, an unlawful assembly, because, according to the finding, they were assembled to commit mischief or criminal trespass; but it cannot be said that the petitioner intentionally joined that assembly, or continued in it. It appears to me, upon the statement of the case by both the Deputy Magistrate and the Judge, that he did not intentionally join an unlawful assembly, or continue in it. What appears to have taken place is that, the *bund* being about to be cut by the persons belonging to the other village, he went there, and was with the people who belonged to his own village, and who were endeavouring to prevent the cutting of the bund. He does not seem to have taken part in any assembly that was unlawful. What he apparently did was, endeavour to prevent any violence being used. He went there to do what persons had a right to do, *viz*, endeavour to prevent mischief being done to property which belonged to them; and I think that he cannot, under the circumstances that have been stated, be considered to have been a member of an unlawful assembly, so as to be answerable for any acts of violence which were committed by the assembly, or any member of it, in prosecution of the common object. The acts of violence committed in prosecution of the common object would be by the inhabitants of the village who were endeavouring to cut the bund. It would be strange if he was to be made answerable as a rioter for that which he went to the place for the purpose of preventing. The Magistrate seems to have considered that it was the duty of the Rajapore people to offer no opposition whatever to the cutting of the bund; that they were to go away and seek the Magistrate, who might be at a great distance, and obtain an order from him, and, if they failed in that, they were to be left to a civil suit to recover compensation for the injury to their crops from persons whom it might be difficult to identify as those who actually committed the mischief, and from whom, if identified, it might not be possible to recover the amount of the compensation. I think that is a view which cannot be supported. This petitioner was, so far as the evidence goes, doing nothing more than what he might properly do to prevent mischief being done to what was found to belong to his village, and to have been an old bund. The conviction must be annulled, there being no evidence in his case of such an offence as he has been convicted of. The fine, if paid, will be returned. We say nothing about the conviction of the other persons, as we have no petition from them before us, and they have, I understand, already undergone the punishment which was awarded to them.

Glover, J.—I concur.

The 26th April 1873.

Present :

The Hon'ble F. B. Kemp and J. B. Phear, *Judges.*

Confession—Evidence—Act I. of 1872, Section 30.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of voluntarily causing grievous hurt.

The Queen

versus

Belat Ali Moonshee and others, *Appellants.*

Mr. M. Ghose and *Baboo Biprodass Mookerjee* for the Appellants.

Before a confession of a person jointly tried with the prisoner can be taken into consideration against such prisoner, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried.

Phear, J.—We think that the verdict of the Jury must be set aside, on the ground that the Judge wrongly directed them with regard to the reception of the so-called confessions of two at least of the prisoners who were jointly tried with the appellants, namely, Kassim Mundle and Budun Mundle. I have, on a former occasion, in a case which I believe is reported in the 19th Vol., Weekly Reporter, page 16, already explained the view which I take as to the proper application of Section 30 of the new Evidence Act. That view is shortly this, namely, that, before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried. It seems to me that it is this implication of himself by the confessing person which is intended by the Legislature to take the place as it were of the sanction of an oath, or rather which is supposed to serve as some guarantee for the truth of the accusation against the other. In the case before us, neither Kassim Mundle nor Budun Mundle say anything which amounts to a confession of their own individual guilt upon the charge, whereon they were tried jointly with the petitioners, appellants.

Both these men distinctly keep themselves out of all complicity in the actual facts which are charged against all the prisoners jointly, and upon which the appellants have been convicted with the others; so that it appears to my judgment that the statements which these men make against the appellants are simply, so far as the charge upon which they have been convicted is concerned, statements made without either the sanction of an oath, or of that substitute for that sanction to which I have already referred, namely, the implication of themselves on the charge upon which they have been tried with the appellants, in short, without the application of any test of truth whatever. There may be some doubt whether these remarks are applicable to the confession of Muneeruddee. Muneeruddee, no doubt, does state facts against himself which amount to a confession of guilt upon the charge on which he and the other prisoners have been convicted; at the same time statements which he makes in this confession against the appellants, if they amount to anything material, seem to me to be statements which make them accessories before the fact if at all, and not actual actors in the transaction which constitutes the foundation of the charge. But, however this may be, it is sufficient for me to say that, in my opinion, in so far as the Sessions Judge has directed that the statements of Kassim Mundle and Budun Mundle against the prisoners can in this trial be treated as evidence against the appellants, this is a wrong direction on a point most material to the fate of the trial, and therefore I think the verdict must be set aside. I further think that we ought not, in this case, to direct a fresh trial, because, upon the best consideration which I have been able to give to the evidence upon the record, the only evidence which there appears to affect the appellants, in addition to the statements of these so-called confessing prisoners, is the testimony of one Jakeer, and I feel that, if I had to try the case as a Juror upon this man's testimony, taken with even the statements of Muneeruddee, supposing this statement to be admissible, I could not convict the appellants of the charges upon which they have

been convicted in the Court below. It therefore appears to me that we ought not to send back this case for a new trial, simply because I am of opinion that the evidence on the record would not be sufficient upon such new trial to convict the prisoners. I would, therefore, set aside the verdict, and direct that the prisoners be discharged.

Kemp, J.—I concur in this judgment.

The 26th April 1873.

Present:

The Hon'ble F. B. Kemp and J. B. Phear, *Judges.*

Confirmation of sentence of death.

Criminal Referred Jurisdiction.

The Queen

versus

Nga Shoay-de, *Prisoner.*

The fact that, except death, no punishment more severe than that which the prisoner is undergoing at the time of the commission of the offence can be inflicted, is not of itself sufficient to justify the Court in condemning the convict to death.

Phear, J.—We do not think the extreme penalty of the law ought to be inflicted in this case. Had not the accused been already under sentence of transportation for life at the time when this offence was committed, there could have been no doubt that the offence itself exhibited no features such as to call for the highest punishment, even of transportation for life. The fact that, except death, no punishment more severe than that which the prisoner is now undergoing can, under the circumstances of the case, be inflicted on him, is not of itself sufficient to justify our condemning the convict to death.

We direct that the sentence of death passed on the prisoner by the Chief Commissioner be set aside, and in lieu thereof he be sentenced to transportation for life.

The 28th April 1873.

Present:

The Hon'ble F. B. Kemp and J. B. Phear, *Judges.*

Evidence of accomplice—Confession—Corroboration—Act I. of 1872, Sections 114, 133.

Committed by the Magistrate, and tried by the Sessions Judge of Purneah, on a charge of dacoity.

The Queen

versus

Udhan Bind and others, *Appellants.*

Although, by Section 133, Act I. of 1872, an accomplice is a competent witness against an accused person, and a conviction would not be illegal, merely because it proceeded upon the uncorroborated testimony of an accomplice, yet it would be unsafe, where the testimony of the accomplice is not corroborated in any material point, except by the confession of a fellow-prisoner, whose testimony likewise requires corroboration, to convict the accused.

Kemp, J.—These four prisoners have been convicted under Section 395 of the Penal Code, and have been sentenced each to five years' rigorous imprisonment.

The prisoner Chooramun confessed before the Joint Magistrate, Mr. Wyer; he also pleaded guilty in the Sessions Court, and part of the stolen property identified by the prosecutor and his witnesses was found in his house. Mr. Shillingford, an indigo planter, has given his evidence in this case, which supports that of the prosecutor in the matter of the identification of the gun. We shall not interfere with the sentence passed upon Chooramun.

With reference to the four prisoners who have appealed to this Court, the Judge admits that the only evidence against them is that of the approver Mohun, corroborated, it is said, by the statements made by Chooramun in his confession. Now, under Section 133 of the new Evidence Act, an accomplice is, no doubt, a competent witness against an accused person, and a conviction would not be illegal,

erely because it proceeds upon the unrroborated testimony of an accomplice. his principle had been previously laid own in the case of Elahie Buksh (5 Weekly eporter). That decision was passed before e new Evidence Act came into operation. nder Section 114 of the same Act, the ourt may presume that an accomplice is worthy of credit, unless he is corroborated material particulars. (Illustration *b* to ection 114 of the Act.) Now, in this case, e accomplice Mohun, who is styled by the essions Judge as a very zealous witness, is ot corroborated in material particulars.

The approver, in his zeal to give evidence gainst a number of men of different vilges, identified in the Sessions Court some lf a dozen prisoners, whose names he mits he did not even know before the dacoity ok place. Then it also appears in the urse of the enquiry that the wife of the isoner Khalman was seduced by Dalla. ow, Dalla is a connection of the approver ohun. The Judge says, that he does not onsider that the fact of Khalman's wife eing seduced by Dalla would give rise to y enmity, because, "with people of such low caste as the prisoner is, the taking away of a man's wife is often far from being any cause for enmity." I cannot concur with e Sessions Judge in this opinion. On the ontrary, as far as my experience goes, I have und that men of the lower classes are xtremely jealous of their wives.

Then there is the fact that these accused ave examined some witnesses, who, on the hole, give them a good character, and say at they are men who occupy and cultivate nd. The Sessions Judge observes that, as e is going to pass a lenient sentence, he oes not think it necessary to send for the itnesses whom they desire to examine, though those witnesses were cited for the urpose of speaking to the good character the prisoners. The Judge's remark on is part of the case is somewhat remarkble. He says: "I am going to pass a lenient ntence, because there does not appear any ggravating circumstances connected with it. nd even if the witnesses give the accused good character, the sentence would not be rther mitigated, and I do not think it ecessary to send for them."

The statement of Mohun not being corrorated in any material points except by the onfessing prisoner Chooramun, whose statenent labors under the same infirmity as at of the approver Mohun, we think that, taking all the circumstances of the case into consideration, it would not be safe to convict the prisoners upon this evidence. We, therefore, direct that they be released.

The 29th April 1873.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Perjury.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of giving false evidence.

The Queen

versus

Shib Prosad Giri, *Appellant.*

Baboo Bipprodass Mookerjee for the Appellant.

A statement, untrue to the prisoner's knowledge, made upon oath in the course of a judicial proceeding, amounts to perjury, notwithstanding the fact that the statement itself is immaterial to the matter before the Court.

Phear, J.—THE course which has been taken by the prosecution in this case appears to be somewhat peculiar. The Sessions Judge in his judgment says: "The charge "is for giving false evidence before a Moonsiff. "The suit was for rent against Hurnarain, "who pleaded in defence that he had paid the "rent, and had receipts signed by Shib Narain "tehsildar. The receipts were filed, and were "denied on oath by Shib Narain, who stated "that he never gave any receipts signing him-"self Shib Narain. That statement is the "foundation of the present charge."

I find that this is so. The present charge runs in these words: "That Shib Prosad "Giri, *alias* Shib Narain Giri, on or about the "20th day of November 1872, in the Court of "the Moonsiff of Namal, stated on oath that he "never grants dakhilas signed *Shib Narain* "*Giri*, which statement being false, he has "intentionally given false evidence," and so on.

* * * *

The deposition which the prisoner gave in the Court of the Moonsiff has been read to us; and it appears that he there stated that he looked at the receipt put in by the defendant Hurnarain, and then said that the signature on that receipt was not his. He went on to add (apparently by way of giving greater force or emphasis to his testimony): "I "sign receipts (dakhila farkhatti) as Shib "Prosad Giri. I never sign as Shib Narain "Giri."

I think certainly one would have expected that the prosecution, in framing the charge against prisoner, would have placed it upon the material portion of the prisoner's statement rather than upon the immaterial. Hurnarian put forward a receipt which purported to be signed by Shib Narain tehsildar. If that receipt had really been signed by the prisoner, then, I suppose, so far as I can judge from so much of the civil suit as has been disclosed to us, Hurnarain's defence would have been complete. The material part, then, of the prisoner's testimony in that case was the passage in which he said the receipt put forward by Hurnarain was not signed by him. If he made that statement falsely, unquestionably that statement was a perjury of the most serious and most material kind. Consequently, I repeat I should have expected that the prosecution, when it set itself to prosecute the prisoner for perjury, would charge him with having committed perjury in that particular statement. It appears, however, that, for some reason or other, the prosecution has chosen, instead of this, to charge him with perjury in the collateral matter, namely, in the statement which he made to the effect, "I never grant "any receipt signing myself Shib Narain." To show how unimportant this last statement is, I need only remark that this statement might be entirely false, and yet, at the same time, it might be perfectly true that the prisoner did not, in fact, sign the receipt which Hurnarain put forward. It seems to me, therefore, that the course taken in this case amounts to prosecuting the prisoner for a shadow while the matter of real substance is allowed entirely to go on one side. Although he may have been rightly convicted in this case, yet it may well enough be that Hurnarain's plea of payment was a false plea in the case tried before the Moonsiff. It is possible to conceive that the prisoner was not prosecuted upon the material statement, because Hurnarain's testimony could not be relied upon; but, if so, in my judgment, he ought not to have been prosecuted at all. However, we must take this case as it comes before us; and we find that the Judge and the assessors have upon the evidence arrived at the conclusion that the statement made by the prisoner to the Moonsiff, to the effect that he never gave any receipt signing himself Shib Narain, was an untrue statement to the prisoner's knowledge. And, inasmuch as that statement was made upon oath in the course of a judicial proceeding, no doubt, by the penal law of this country, it amounts to perjury, notwithstanding the fact that the statement itself was immaterial to the matter before the Court. On looking to the evidence, which we have had read through very carefully, it appears that there is the testimony of the witness, Ram Narain Jana, who says that the prisoner has given him several receipts marked in Court, A, B, C, &c., and that he saw the prisoner sign his name upon them, and that that name is Shib Narain. The Sessions Judge and assessors have believed this man, and if his testimony is worthy of credit, unquestionably it makes out very clearly that the prisoner told a falsehood, when he said in effect that he never at any time gave any receipt signing himself Shibnarain. It is impossible for us to say that the Sessions Judge and the assessors were wrong in giving credit to this man's testimony, and consequently we think that we are unable to disturb the conviction.

We are, however, of opinion, having regard to the nature of the charge that is made against him, namely, that it is not a charge of having committed perjury in the statement of any fact material to the suit in which the testimony was given, that, indeed, as I have already shown, it left the substantive issue of truth or untruth wholly untouched. We are of opinion that the sentence passed upon the prisoner is unduly severe; we think that it ought to be reduced, and accordingly we reduce it to rigorous imprisonment for four months, reckoning that period from the date of the original conviction.

The 30th April 1873.

Present:

The Hon'ble F. B. Kemp and J. B. Phear, *Judges.*

Misdirection—Charge to Jury—Act X. of 1872, Sections 255 and 256.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of criminal breach of trust.

The Queen

versus

Rajcoomar Bose, *Appellant.*

Mr. M. Ghose and *Baboo Bipprodass Mookerjee* for the Appellant.

The High Court will set aside the verdict of a Jury only in such cases in which, by a misdirection to the Jury, the accused has been materially prejudiced, or where there has been a failure of justice.

Kemp, J.—The prisoner, the Deputy Post-master of Buggolah, in Zillah Nuddea, was suspended on the 2nd of May 1872. It appears that the reason of his suspension was that he had reason to find fault with a subordinate of the name of Jullodhur, and recommended his removal. His immediate superior wished to reinstate Jullodhur, but Rajcoomar Bose, the prisoner, objected to this, and this conduct on his part was considered to amount to insubordination, and led to his suspension. Subsequent to his suspension, his successor, on taking charge of the post-office of Buggolah, found that the cash-balance in his hands amounted to Rs. 57. Of this sum the prisoner accounted for Rs. 2, and said with reference to the balance of Rs. 55 that it had been expended by him, partly in keeping up a boat during the inundation of 1871, and partly in paying the wages of a Railway-peon of the name of Sreesh Chunder Pal. An explanation was called for from the prisoner Rajcoomar Bose, which he submitted in great detail to the post-office authorities. In this explanation he makes the same statement with reference to the Rs. 55 cash-balance that he now makes before the Sessions Judge. The post-office authorities, not deeming that explanation altogether satisfactory, directed the Inspecting Post-master, who has been examined in this case, to prosecute Rajcoomar Bose. The charges against Rajcoomar Bose are, under Section 409 of the Penal Code, of criminal misappropriation of moneys which were in his charge in his capacity as a public servant. The Deputy Magistrate framed the charge under one head, but the Sessions Judge, for some reason which we do not quite understand, thought proper to split it up into three separate and distinct charges. The case was tried with the aid of a Jury, and they convicted the prisoner under Section 409. The Sessions Judge has sentenced him to five years' rigorous imprisonment. The main grounds of the appeal are that the Judge has misdirected the Jury, and that his summing-up is one-sided; that he has omitted to point out to the Jury the evidence and points in favor of the prisoner; that he has omitted to point out to them the enmity which admittedly existed between the principal witness Jullodhur and the prisoner; that, with reference to the alleged alteration of the date in the letter, which is marked *J* in the book, he ought to have pointed out to the Jury that the prisoner's case was that the letter in question was despatched in September; that there was no reason why the prisoner should alter the date from September to October, while the body of the letter remained unaltered, which conclusively shows that the letter was despatched in September, and not in October; and, further, that the prisoner could have had no control whatever over that letter-book, inasmuch as, from the date of his suspension in May 1872, to the date of his trial many months after, it was never in his custody. Then it is urged that the Judge entirely omitted to draw the attention of the Jury to the fact that the prisoner's case was not that he contracted with the boatmen directly with reference to the hire of the boat during the inundation, but that the contract was made with Jullodhur, and therefore the Judge was wrong in prominently calling the attention of the Jury to the fact that the prisoner, instead of paying the boatmen, had paid Jullodhur, and directing them to take that circumstance into consideration as evidence against the prisoner. Then, and this is the most important error in the summing-up, and by which undoubtedly the Judge has misdirected the Jury in a most important part of the case, inasmuch as the Judge has directed the Jury to hold as conclusive evidence against the prisoner the fact that the books which are admitted by him show that in January there was no such sum amounting to Rs. 40 as cash-balance from which the prisoner could have paid the witness Jullodhur, as stated by him; whereas, on referring to these books, it appears that, up to January, there was a balance of Rs. 43. There are other minor omissions pointed out by the prisoner in the petition of appeal, but

we think it sufficient for the purposes of this judgment to notice the principal ones which have been stated above. The petition winds up with a statement that the sentence of five years' rigorous imprisonment is too severe with reference to the prisoner's youth, and, on turning to the answer of the prisoner, we find that he is a young man of the age of 21.

Now, in this case, undoubtedly, the summing-up of the Judge is very defective, and he has, in one or two instances, and notably in the instance of the cash-balance book, altogether misdirected the Jury. The Jury in this case have not been intelligently guided by the Judge, evidence has been placed before them which ought not to have been placed before them, and deductions have been drawn from facts which do not exist. The style of the charge also appears to us to be very objectionable. The Jury are repeatedly called upon in the following terms: "Do you believe this?" "Can you believe that?" instead of leaving them to judge of the evidence, and to decide what weight is to be attached to it.

Now, it is not in every case in which there has been a misdirection to the Jury that this Court will set aside a verdict of guilty, but only in such cases in which the accused has been materially prejudiced, or where there has been a failure of justice. In other words, if this case had been tried with the aid of assessors, and this Court, on appeal, after reading the whole of the evidence, should come to the opinion that the verdict was not warranted by the evidence, this Court would be justified, under the ruling to be found in the 5th Vol., Weekly Reporter, in the case of Elahee Bux, to set aside the verdict, to direct the discharge of the prisoner, and not to direct any fresh trial. In this case, I have very carefully gone through the evidence, and I think that the prisoner is on that evidence entitled to an acquittal. The first sum which he is charged with misappropriating is a sum of Rs. 40, which, as already stated, has been split up into two items of Rs. 33-5-4 and Rs. 6-10-8. Now, there are letters from his immediate superior on the record, which show that the prisoner applied for, and obtained sanction for, the employment of a boat during the great inundation which took place in 1871 in the Nuddeah district, whereby all communication by land was cut off, and no delivery of letters could be made until a boat was obtained. The prisoner's story is, that he hired this boat through Jullodhur, who was then subordinate to him, and that, although he repeatedly applied to his immediate superiors to remit the money for the hire of the boat, this was not done, until very long after; that repeated demands were made for the money by the boatmen, and that he, therefore, advanced the Rs. 40 on various occasions through Jullodhur to the boatmen, and that he took from Jullodhur a receipt for the whole sum of Rs. 40. That receipt has been produced by the prisoner; it is witnessed by Kedar Bose and Sreesh Chunder Pal, and signed in English by Jullodhur, rural messenger. Kedarnath has been examined, and he states that the receipt was signed by Jullodhur in his presence, and that the money was also paid in his presence. Sreesh Chunder Pal has also been examined, and he says that the signature is not his. We have, therefore, the evidence of Kedar Bose to the fact that the receipt was signed by Jullodhur, and that the money passed to him. On the other hand, we have the denial of Sreesh Chunder Pal. The signature of Sreesh Chunder Pal is a very peculiar one; and on a careful comparison of this signature with his admitted signature on another document, which is on the record, I am clearly of opinion that Sreesh Chunder Pal has not given true evidence in this case, and that his statement, that he did not sign as a witness the receipt granted by Jullodhur, is false. Then, on the other charge, the fact that Sreesh Chunder Pal admits that he wrote the receipt for Rs. 15, being the amount of his salary for three months, and that he also signed that receipt, but he states that he did not receive the money, namely, the Rs. 15. Here, again, we have, in this instance also, the statement of the witness Kedar Bose, who deposes that Sreesh Chunder did sign the receipt, a fact admitted by him, and that the money was paid to him.

On the whole case, therefore, if this had been a trial with the aid of assessors, instead of a trial by Jury, we should not think it right to convict the prisoner upon this evidence. We, therefore, do not direct a fresh trial, but direct that the prisoner be discharged.

Phear, J.—I entirely concur in all that has fallen from my learned brother, Mr. Justice Kemp, but I think that, under the circumstances of the case, it may be as well if I add a few words, inasmuch as it very constantly devolves upon me to conduct trials by Jury, and it seems to me, judging by the aid of my own experience, that in one particular, at any rate, the trial of this case in the Sessions Court has not been exactly what the law contemplates. It seems to me that the Judge's

charge to the Jury was not a summing-up of the evidence for the prosecution and defence such as is prescribed by the words of Section 255 of the Criminal Procedure Code; it was rather, as I read it, a sustained effort at persuasion, and there was no real endeavour made by the Sessions Judge to present the evidence on the one side and the other, both impartially before the Jury. If I may be allowed to say so, I think that this error probably proceeded from the adoption of the narrative from of charge. It is impossible, I imagine, to put a case to a Jury in the narrative form from beginning to end with complete fairness to both sides, without giving the narrative a double shape, *i. e.*, stating it, so to speak, in the alternative, and I apprehend that very few persons, indeed, are able to do this with any great degree of success. It is, no doubt, most useful, because it saves time, that the Judge should state to the Jury in the narrative form so much of the facts as are admitted on both sides. But, when he has reached this point, it is best, I think, that he explains distinctly the issues of fact which it remains for the Jury to determine, having regard to that part of the case which is admitted, and to the charges upon which the prisoners are tried, and having made the Jury understand these issues, the more convenient mode of summing-up for him to adopt is, in my judgment, to present to the Jury, as clearly and impartially as he can, a summary of the evidence and the considerations and inferences to be drawn from the evidence, as they bear both on the negative and affirmative sides of each of the issues. It is impossible, of course, for any Judge to state every item of evidence, or to draw the attention of the Jury to every fact which has been deposed to, but he can, without difficulty, give them a summary of the leading points of the evidence, and the considerations and inferences to be drawn from it on the one side and on the other. He may, if he thinks fit, under the last Clause of Section 256, at the same time express to the Jury his own opinion as to the facts; but that is a very different thing, indeed, from that which the Sessions Judge has done in this case. The Judge has not, as I read his charge, simply expressed his opinion, and then left all the evidence fairly before the Jury on the one side, and on the other for them to judge of it by the aid of his opinion, if they chose to avail themselves of it. But he has endeavoured (I think that, at any rate, is the impression which his charge has given me from first to last) to persuade the Jury to take the particular view of the facts and of the inferences from the evidence, which he himself has taken and drawn, and, indeed, he has left them no loophole for taking any other view. This is not only not in accordance with the enactment of the Code of Criminal Procedure as I understand it, but I think it is a course calculated in the mofussil to withdraw altogether from the Jury the actual decision of the case. Probably, in other tribunals than a Mofussil Sessions Court, it might lead to exactly the opposite result to that which, I suppose, was desired by the Sessions Judge, that is, it would, in such a case as the present, lead to the opposite view being adopted by the Jury, and so would cause an acquittal to be come to instead of a conviction. I concur with the decision pronounced by Mr. Justice Kemp.

The 18th April 1873.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Divorce—Mahomedan law—Maintenance—Act X. of 1872, Sections 536, 537.

Nepoor Aurut

versus

Jurai.

An order for maintenance having been made under Section 536 of Act X. of 1872, the plaintiff applied to have the order enforced. The defendant, being called on to show cause why the order should not be enforced, divorced his wife (the plaintiff) in the presence of the Court. HELD that, even if such divorce made such an alteration in the circumstance as to justify the Court, on the application of the husband (the defendant), in altering the order for maintenance, yet the defendant would not be relieved from obeying the order during the time which had elapsed up to the date when and until that change of circumstances had occurred.

THIS case was referred to the High Court, under Section 296 of Act X. of 1872, in the following terms :—

"Nepoor Aurut prayed for and obtained

an order of maintenance on the 18th May 1872 in the Court of a full-powered Magistrate, Moulvie Amiruddin, who, at that time, declared that the plea of divorce set up by the husband had not been proved.

"On the 20th June following, the woman petitioned, saying that the husband had failed to carry out the orders of the Court, and the case was made over to Moulvie Abdool Karim for needful orders with regard to the realization of the money due. On the 23rd July, the Moulvie declared that, as the husband had divorced his wife, she was not entitled to maintenance, and that maintenance for the child could only be granted till he was 2½ years of age. This order has only lately come to my knowledge, and I called on the Moulvie for any explanation he might wish to make. In his explanation he has stated his views, but, as it seems to me they are erroneous, and his orders contrary to law, I forward the records for the perusal of the Court.

"In the first place, the case was sent to the Moulvie for realization of the money, and not for enquiry into any objections raised by the man on any subject not connected with payments already made; secondly, even had the Deputy Magistrate been authorized to enquire into any objections filed, it was not within his power to decide on the question of the alleged divorce, inasmuch as that had been already disposed of by a competent Court

"The Deputy Magistrate in his explanation states that he did not look to the divorce alleged to have taken place previous to the orders of Moulvie Amiruddin, but to that which the husband in his presence gave to the woman, and which, according to the Mussulman law, was good and sufficient, and amounted to a change of circumstances, which authorized a fresh order from him."

Phear, J.—It does not appear very clear upon the papers which have come up to us in this reference what precisely was the order that was made by the Deputy Magistrate on the second occasion. We understand that an order for maintenance under the legislative provisions which are found in Section 536 of the existing Criminal Procedure Code was originally made, and that it came before the Deputy Magistrate for the purpose of being enforced. It appears from the Deputy Magistrate's letter of explanation that he called the husband before him to show cause why the order should not be enforced, and that the husband thereupon, in his presence, divorced his wife.

And we cannot gather from the Deputy Magistrate's statement what course he took at this stage. He tells us that he considered the divorce so effected by the husband was sufficient to relieve the husband from the duty of compliance with the order of maintenance. As I have already said, however, the Deputy Magistrate does not state in words what formal order he passed. Now, it is clear, I think, that, as long as any order duly made under Section 536 or its former equivalent is existing, unaltered by any subsequent proceeding, it is operative, and it would be the duty of the Deputy Magistrate, when called upon by the wife, in whose favor the order was made, to enforce it. The following Section (537) provides a mode in which the person against whom the order is made can, upon a change of circumstances, get that order altered. And it seems to me probable that, upon the facts stated by the Deputy Magistrate, when the husband, in his presence, divorced his wife, such an alteration of circumstances did occur which would justify the Deputy Magistrate, upon the application of the husband, in altering the order for maintenance in favor of the wife.

At the same time, it appears to me quite clear that that change of circumstance, even if it were such as to justify the withdrawal of the order of maintenance against the wife altogether, would not relieve the husband from the necessity of obedience to the order during the time which had elapsed up to the date when and until that change of circumstance had occurred; in other words, that the husband was, at any rate, strictly bound to pay the maintenance-money according to the terms of the order up to the date when, in the Magistrate's presence, he divorced his wife, as the Deputy Magistrate says he did.

With these remarks, which may serve as some guidance to the Deputy Magistrate, we direct that the record be returned to him, in order that he may take the requisite steps in the matter, and pass the proper orders.

RULES AND ORDERS OF THE HIGH COURT.

LIST OF THE AUTHORIZED HOLIDAYS FOR THE YEAR 1873.

[*Omitted, as being unnecessary.*]

Warrants for sentences exceeding two years to be on paper of a superior quality, and Sessions Judges to indent accordingly.

CRIMINAL CIRCULAR ORDER No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Sessions Judges in the Regulation and Non-Regulation Provinces, dated the 3rd January 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

ALL Sessions Judges in the Regulation and Non-Regulation Provinces are hereby informed that, in the opinion of the Court, all warrants for sentences exceeding two years should be on paper of a superior quality to that on which warrant-forms are now printed. Sessions Judges should, therefore, indent for forms of such warrants in due proportions, and see that the forms are used in the manner above indicated.

Rules on Original Side regarding the payment of High Court stamps on depositions, &c., and the effect of non-payment.

IT is ordered that the following rules be read and passed as the rules and orders of the High Court of Judicature at Fort William in Bengal in its original jurisdiction, to take effect from the fifteenth day of January 1873:—

1. If a suitor appear in person, he shall affix on the deposition of each witness examined on his behalf, within 48 hours after the termination of the trial, High Court stamps equal to the amount of the fee payable for swearing and reducing into writing the deposition of such witness.

2. In all cases in which the parties are represented by the attorneys, the attorney for each party will be held personally responsible to the Court for the payment of the fees for swearing and reducing into writing the depositions of witnesses examined on behalf of his client.

3. In every such case, High Court stamps equal to the amount of the fee payable for swearing and reducing into writing the deposition of each witness shall, within 48 hours after the termination of the trial, be affixed on his deposition by the attorney of the party on whose behalf such witness shall be examined.

4. If default be made in complying with the last preceding rule, the Registrar will give notice in writing to the defaulting attorney that, unless the fees due be paid within 24 hours from the service of the notice, application will be made against him for an order prohibiting him from acting as an attorney.

5. Every attorney who shall not have paid the fees due as aforesaid within the time mentioned in the Registrar's notice may be, if the Court shall think so to direct upon the application of the Registrar (which it shall be his duty to make), prohibited from acting as an attorney until the further order of the Court.

6. Every order suspending an attorney from practice for non-payment of fees shall be set aside on the certificate of the Registrar that the fees have been paid.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
F. A. GLOVER.
DWARKANATH MITTER.
W. AINSLIE.
CHARLES PONTIFEX.

The 9th January 1873.

Prescribes form of diary to be kept by Small Cause Court Judges, to be submitted monthly.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Judges of Courts of Small Causes, Lower Provinces, dated the 14th January 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

THE Court is pleased to prescribe the form of diary appended hereto, to be attached to

the monthly returns of work submitted by Judges of Small Cause Courts. The following instructions should be carefully attended to in its preparation:—

The third column to be filled up for all days of sitting.

When there has been no sitting and the day is not an authorized holiday, the cause of not sitting should be shortly stated. The mode of filling up the diary is exemplified.

2. The form will be supplied separately where there is a stock of forms of the nature prescribed by Circular Order No. 3, dated 9th February 1872,* and will be printed on the back of new forms of the statement of cases as they are supplied to Small Cause Court Judges.

Diary of the Court of Small Causes of *for the month of* 187 .

Date.	How employed.	Hours of Sitting.	Remarks.
1	Sunday ...	.....	
2	Sat in Howrah Court ...	10-30 to 5 o'clock.	
3	Ditto ditto ...	10-30 „ 5-15 „	
4	Gazetted Holiday ...	.....	
5	Sat in Serampore Court	10 A.M. to 5 P.M.	
6	Sat as Subordinate Judge	.....	

* 17. W. R., Cirs., 2.

Circulates letter to Superintendent of Stationery regarding Monthly Statement showing the average duration of cases before the Magisterial Authorities.

CRIMINAL CIRCULAR MEMO. No. 1.

Letter No. 5, from F. B. Peacock, Esq., Registrar of the High Court of Judicature at Fort William in Bengal, to the Superintendent of Stationery, dated Calcutta, the 3rd January 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

SIR,—I am directed to request that you will be so good as to add to your list of authorized criminal forms the accompanying form of monthly statement, showing the average duration of cases before the Magisterial Authorities in different districts from the date of apprehension or attendance on summons to that of disposal.

I have, &c.,

(Signed) F. B. PEACOCK,

Registrar.

CIRCULAR MEMO. No. 1.

COPY forwarded to the Criminal Authorities in the Lower and Extra Regulation Provinces.

By order of the High Court,

(Signed) W. M. SOUTTAR,

Offg. Registrar.

HIGH COURT,
The 8th January 1873.

Average duration of Cases before the Magisterial Authorities in Zillah *from the date of*
apprehension or attendance on summons to that of disposal, for the month of *187 .*

1	2	3	4	5	6	7	8	9	10	11	12	13	14
	Cases in which the agency of the police was employed.								Cases in which the agency of the police was not employed.				
	Number of Cases.	Number of Days pending in Mofussil.	Number of Days pending before the Magistrate.	Total number of Days.	Average time occupied in Mofussil.	Average time occupied before the Magistrate.	General Average.	Longest time a case was pending.	Shortest time a case was pending.	Number of Case.	Number of Days pending.	Average Time.	Longest Time.	Shortest Time.
Total ...														

The *187 .* *Magistrate.*

Draws attention to a Circular Order of the Board of Revenue, and enjoins vigilance with a view to guard against fraud and forgery of adhesive Court-fee Stamps.

CIVIL CIRCULAR ORDER No. 2.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Courts, dated the 16th January 1873.

(Civil Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

The attention of all Civil Courts of every grade is drawn to the subject of the annexed Circular which has been issued by the Board of Revenue to all Revenue Officers, with reference to the risk of fraud arising from the facility with which adhesive stamps may be forged, and the consequent necessity for special examination by every head of a Revenue Court of such stamps presented in payment of Court-fees.

2. The Court desire that Judicial Officers of all grades should exercise in this matter such vigilance as they may. The Court also think it desirable that an examination by experienced Revenue Officers should be occasionally made in respect of the stamps affixed to documents filed in Civil Courts, and on this point the Board of Revenue has been addressed.

Circular Order.

Stamps.
A. Money, Esq., C.B.

Certain attempts to forge the adhesive stamps lately issued for the purpose of denoting Court-fees have been recently brought to light, and the Member in charge now calls the earnest attention of all District Officers to the risk of fraud arising from the greater facility with which such stamps can be forged in comparison with impressed stamps.

Large quantities of these adhesive stamps are daily presented in payment of process-fees, and very seldom come under the actual observation of the head of a Revenue Court. Attempts to use forged stamps are more likely, therefore, to occur in connection with this mode of using stamps than with any other. Every head of a Court in which such fees are paid by stamps is desired, in future, to call for, from time to time, papers which have been so stamped, and to satisfy himself thoroughly by personal examination that the stamps used in his Court are genuine.

Asks for information with a view to the establishment of "Bar Libraries" at Sudder Stations.

CIVIL CIRCULAR ORDER No. 3.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to District

Judges and Judicial Commissioners, dated the 16th January 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

WITH reference to a scheme now before the Government of India for the establishment of "Bar Libraries" at Sudder Stations, to be supported by Government and by private subscriptions, and at the instance of His Honor the Lieutenant-Governor of Bengal, the Court requests that each District Judge and Judicial Commissioner will, after communication with the Chief Executive Authorities of the district, report:—

First, what books already exist in his own Office, as well as in that of the District Officer; *secondly*, what possible subscriptions may be expected at each Sudder Station towards the object in contemplation; and, *thirdly*, what, so far as can be estimated, would be the probable cost to Government at each station of maintaining a Bar Library.

Supersedes Warrants for the Release of accused persons. Prisoners to be directed to be set at liberty.

CRIMINAL CIRCULAR ORDER No. 2.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Criminal Authorities, dated the 18th January 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

THE warrant for release of an accused person who has been acquitted prescribed by the late Sudder Court's Circular No. 2, dated the 10th January 1862, is hereby superseded, and Criminal Courts are informed that they ought, in such cases, simply to direct that the prisoner be set at liberty.

Rules requiring Particulars of property to be given in Petitions for Probates, &c.

IT is ordered that the following Rule be read and passed as the Rule of the High Court of Judicature at Fort William in Bengal to take effect from the first day of March 1873:—

Every petition for probate or letters of administration shall contain, in addition to the particulars required by the Indian Succession Act, 1865, a statement containing such details as will show fully how and on what principle the value is calculated or arrived at.

(Signed) R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
F. A. GLOVER.
DWARKANATH MITTER.
CHARLES PONTIFEX.
W. AINSLIE.

Dated the 19th February 1873.

Rules regarding the Admission of Special Appeals.

IT is ordered that the Rule of 19th December 1870 directing that "all applications for the admission of special appeals shall be presented in open Court" with the further rules as to the hearing of such applications of the 28th March 1871 and the 27th January 1872 be rescinded; and that such applications shall henceforth be made according to the practice of the Court before the said rule of the 19th December 1870 was made.

(Signed) R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
F. A. GLOVER.
DWARKANATH MITTER.
C. PONTIFEX.
W. AINSLIE.

Dated the 27th February 1873.

Directs District Judges to append Statement of the Cause of Rejection to all Orders rejecting Applications of Candidates to the Pleadership Examination.

CIVIL CIRCULAR ORDER No. 4.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District Judges and Judicial Commissioners, dated the 25th January 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

THE attention of the Court has been called to the circumstance that the applications of candidates for admission to the Pleadership Examination are sometimes rejected by District Judges without the causes of such rejection being definitely stated, so that it is neither possible for the High Court in case of complaint, where the Judge has left the district, to ascertain whether good ground for rejecting the candidate existed, nor is there anything to guide the Judge's successor in case of subsequent application by the same party.

2. The Court direct accordingly that a brief but exact statement of the cause of rejection be appended in future to all orders rejecting such applications.

Draws attention to the section of the Civil Leave Code which requires urgent necessity to be shown in Applications by Judicial Officers for Privilege Leave.

CIVIL CIRCULAR MEMO. No. 1.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to District Judges, dated the 25th January 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

SEVERAL applications for privilege leave of absence from Subordinate Judicial Officers having been received by the Court, in which no urgent necessity has been either alleged or shown to exist for the indulgence, attention is drawn to clause 1, section 18, Chapter VI. of the Civil Leave Code, which, for facility of reference, is entered on the margin.

"To Uncovenanted Judicial and Educational Officers whose duties are not continuous, and who enjoy regular vacations, during which they are allowed to be absent from duty, privilege leave is not admissible except in cases of urgent necessity."

Prescribes two Forms of Warrants for Adoption by Civil Courts when committing Civil Prisoners to Jail.

CIVIL CIRCULAR ORDER No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Authorities subject to the High Court, dated the 27th January 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

THE two accompanying Forms of Warrant (as per margin) are hereby prescribed for adoption by Civil Courts, when committing civil prisoners to the custody of the officer in charge of the Jail, with reference to either section 78 or section 278 of the Civil Procedure Code.

Form of Warrant for imprisonment on failure of giving bail for appearance.

Form of Warrant for imprisonment in execution of a civil decree.

2. The Superintendent of Stationery will be instructed to add the forms in question to his list of authorized civil forms.

In the Court of
SUIT No. OF 187 .

To

THE OFFICER IN CHARGE OF THE JAIL AT IN DISTRICT

Whereas been brought before this Court this day of one thousand eight hundred and seventy- under a warrant of

d

arrest issued under section 75 of Act VIII. of 1859 on the day of one thousand eight hundred and seventy- in a suit wherein plaintiff and defendant, and by which warrant the said directed to show cause why should not give good and sufficient bail for appearance in this suit. And whereas the said not given such bail nor satisfied the Court that entitled to be discharged from custody under the provisions in that behalf of Act VIII. of 1859: You are hereby, in Her Majesty's name, commanded and required to take and receive the said into the said jail and keep imprisoned therein until the satisfaction of any decree that may be passed against in the suit, or the said shall be otherwise entitled to be released according to the terms and provisions of section 78 of the said Act. And the Court does hereby fix annas per diem as the rate of the monthly allowance for subsistence of the said during confinement under this warrant of commitment.

Given under my signature and the seal of this Court the day of in the year of our Lord one thousand eight hundred and seventy- .

In the Court of
SUIT No. OF 187 .

To
THE OFFICER IN CHARGE OF THE JAIL AT

Whereas been brought before this Court this day of one thousand eight hundred and seventy- under a warrant in execution of a decree which was made and pronounced by the said Court on the day of one thousand eight hundred and seventy- in a suit wherein plaintiff and defendant, and by which decree it was ordered that the said should pay , and whereas the said not obeyed the decree nor satisfied the Court that entitled to be discharged from custody under the provisions in that behalf of Act VIII. of 1859: You are hereby, in Her Majesty's name, commanded and required to take and receive the said into the jail, and keep imprisoned therein until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 278 of the said Act. And the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during confinement under this warrant of commitment.

Given under my signature and the seal of this Court the day of in the year of our Lord one thousand eight hundred and seventy- .

Modifies Form of Warrant for Sentences of Death (No. 1) prescribed by Circular Order of February 1870.

CRIMINAL CIRCULAR ORDER No. 3.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Sessions Judges and Judicial Commissioners, dated the 7th February 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges*.

IN modification of the form of warrant for sentences of death, being No. 1 of the forms prescribed by Circular Order No. 6, dated the 23rd February 1870,* the Court is pleased to direct that the words, "on or so soon thereafter as may be," be substituted for the words "on or before" in the second line of the second sentence fixing the period for execution.

2. The existing stock of forms should be corrected by hand according to the foregoing instruction, and the Superintendent of Stationery will be directed to make the necessary alteration as regards future supplies.

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13 W. R., Criminal Circulars 7.

Circulates Letter explaining how the Average Duration Statement is to be filled up.

Letter No. 244, from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to the Officiating Magistrate of Purneah, dated the 28th February 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

SIR,—IN reply to your No. 294, dated the 1st instant, I am directed to observe that the object of the Average Duration Statement, of which a form was appended to Circular Memo. No. 1, dated 8th January 1873,* is to enable the District Magistrate to fill up column 15 of Judicial Statement No. 3 (annual). Accordingly those persons only should be included in the former who would properly come into columns 3 to 6 of the latter as "brought to trial."

I have, &c.,

(Signed) W. M. SOUTTAR,

Offg. Registrar.

CRIMINAL CIRCULAR MEMO. No. 2.

COPY forwarded to Magistrates in the Lower and Extra Regulation Provinces.

By order of the High Court,

(Signed) W. M. SOUTTAR,

Offg. Registrar.

HIGH COURT,
The 28th February 1873.

Directs the Discontinuance of the Submission of Explanations regarding the Cause of Delay in the Disposal of Civil Suits and Appeals, which are in future to be reviewed by District Judges.

CIVIL CIRCULAR ORDER No. 6.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District Judges and Judicial Commissioners, dated the 15th February 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

THE submission of explanations regarding the cause of delay in disposing of civil suits and appeals is to be discontinued.

2. In future such explanations, when furnished by the inferior Courts in a District, will be reviewed by the District Judge, in whom (subject to the superintendence of the High Court) the general control over all the Civil Courts in his District is by law vested.

3. The District Judge will append to the quarterly statements a certificate to the effect that he has carefully considered these explanations, and either that he has found them satisfactory or that he has taken the needful steps in respect of those which have been found unsatisfactory.

4. Any case which appears to him to call for special notice will be separately brought to the notice of the Court, and wherever a case has been pending for more than a year, the circumstances are to be so reported.

5. The Court rely upon the earnest co-operation of the District Judges.

Requests Officers who have two Departments to attend to, to indicate in their Periodical Return the number of Days of sitting in each Department.

CIVIL CIRCULAR MEMO. No. 3.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District and Sessions Judges, and Magistrates of Districts, dated the 28th February 1873.

(CIVIL AND CRIMINAL.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

DISTRICT and Sessions Judges and Magistrates of Districts and other Officers who have work in two departments to attend to are requested, in submitting the periodical returns of each, to indicate the number of days of sitting in that department or that side of their Courts during the period to which the statement relates, accounting for the remaining time.

* *Ante,* p. 3.

Directs discontinuance of certain Registers prescribed by the late Sudder Court's Circular No. 144, dated 16th August 1843.

CRIMINAL CIRCULAR ORDER No. 4.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Magistrates, Lower Provinces, dated the 25th February 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges*.

THE Court having had under revision the Registers prescribed by the late Sudder Court's Circular Order No. 144, dated 16th August 1843, are pleased to direct the discontinuance of the following Registers :—

(1.) Register A, styled "General Register of all applications preferred direct to the Magistrates," &c., superseded by the Register prescribed by Circular Order No. 5A, dated 7th September 1868, *i.e.*, the "Register of Criminal Complaints."

(2.) Register B, "General Register of all reports received from Police Darogahs," &c., as such reports are otherwise provided for.

(3.) Register No. 1, "Book of Heinous Offences," and

(4.) Register No. 2, "Petty Offence Book," as such separate Registers, in addition to Register C, are unnecessary.

(5.) Register No. 5, "Register of cases under Act IV. of 1840," &c., as these cases do not require a special Register.

(6.) Register of persons charged with, or suspected of, the commission of specific crimes of a heinous nature, who may have eluded the pursuit of justice. This is a Police and not a Judicial Register.

2. The Registers that will be retained are:—

(1.) Register C, Record-keeper's Register.

(2.) Register No. 3, Register of Appeals.

(3.) Register No. 4, Register of references from other districts.

(4.) Register No. 6, Register of miscellaneous matters.

These Registers may be numbered 1, 2, 3, and 4 respectively.

Circulates list of headings in order to the correct and uniform filling-up of column 1 of the Annual Judicial Statement BI for 1872.

CIVIL CIRCULAR MEMO. No. 2.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil and Criminal Authorities, dated 26th February 1873.

(CIVIL AND CRIMINAL.)

Present:

The Hon'ble Louis S. Jackson, *Judge*.

IN order to the correct and uniform filling-up of column 1 of Judicial Statement (annual) BI, the following list of headings is circulated for the guidance of all Civil and Crimi-

nal Courts subject to the control of the High Court to be adopted in the preparation of the return in question for the past year, 1872.

2. The list now circulated will have to be altered for the period subsequent to 1st January 1873, when Act X. of 1872 came into operation, and it will be so altered:—

LIST OF HEADINGS.

Local and Subordinate Magistrates exercising Criminal powers only ... ... } Paid. Unpaid.

Local and Subordinate Magistrates exercising Criminal and Civil powers.

Local and Subordinate Magistrates exercising Criminal and Revenue powers.

Local and Subordinate Magistrates exercising Criminal, Civil, and Revenue powers.

Magistrates in charge of Divisions of Districts exercising Criminal powers only.

Magistrates in charge of Divisions of Districts exercising Criminal and Civil powers.

Magistrates in charge of Divisions of Districts exercising Criminal and Revenue powers.

Magistrates in charge of Divisions of Districts exercising Criminal, Civil, and Revenue powers.

Boards or Benches of Magistrates.

Magistrates of full powers exercising only Criminal powers.

Magistrates of full powers exercising also Revenue powers.

Magistrates of full powers exercising also Revenue and Civil powers.

Magistrates of Districts exercising only Criminal powers.

Magistrates of Districts exercising also Revenue powers.

Magistrates of Districts exercising also Revenue and Civil powers.

Magistrates exercising the powers described by Act VIII. of 1869, section 445A.

Courts of Session.

Moonsiffs exercising only Civil powers.

Moonsiffs exercising also Revenue powers.

Moonsiffs exercising also Criminal powers.

Moonsiffs exercising also Revenue and Criminal powers.

Small Cause Courts exercising no other functions.

Judges of Courts exercising also ordinary Civil (or Revenue) powers.

Judges of Courts exercising Criminal or Revenue as well as Civil powers.

Subordinate Judges without other functions.

Subordinate Judges exercising jurisdiction of Small Cause Court Judge.

District Judges.

Judicial Commissioners with powers of District Judges.

Draws attention to Circular Order of 1863, and enjoins Judges to take their seats punctually.

CIVIL CIRCULAR ORDER No. 7.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Authorities, Lower Provinces, dated the 7th March 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

THE attention of all Civil Courts of every grade is called to the subject of the penultimate paragraph of Circular Order No. 31 of the 13th October 1863, and the duty of taking their seats punctually at the hour appointed for the sitting of their Courts is enjoined upon all Judges.

Prescribes New Forms of Warrants for Capital and Other Sentences.

CRIMINAL CIRCULAR ORDER No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Criminal Authorities, dated the 11th March 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

IN supersession of the forms of warrant prescribed by Circular Order No. 6, dated the 23rd February 1870, the Court is pleased to circulate, for general adoption, the forms appended hereto, namely :—

1. A form of warrant for the execution of capital sentences.
2. A form of warrant for sentences of transportation.
3. A general form of warrant for other sentences (Form D of the Code of Criminal Procedure).
4. A form of warrant for the levy of fine.

2. The first two forms are applicable to Courts of Session only; but the third form is general, and applies to Magistrates as well as to Sessions Judges.

3. The fourth form relates to fines. This warrant is intended for the use of Courts of Session and Magistrates when it is necessary to enforce a sentence of fine.

WARRANT OF COMMITMENT (SECTION 303, C. C. P.).

To

Jailor of

WHEREAS
son of
of Village
Pergunnah
in the District of
was convicted before me*
of the offence of†
and was sentenced to‡

You are hereby required to receive the said

* Name and official designation (specifying powers in case of Magistrate).
† Mention the offence, quoting also Act and section.
‡ State the punishment fully and distinctly, mentioning its nature and extent.

into your custody in the said Jail of
together with this warrant, and there carry the aforesaid sentence into execution according to law.

Dated the *day of* .

WARRANT OF COMMITMENT FOR TRANSPORTATION.

To

Jailor of .

WHEREAS
son of
of Village
Pergunnah
in the District of
was convicted before me*
of the offence of†
and was sentenced to‡ .

You are hereby required to receive the said
into your custody in the said Jail of
in order to the aforesaid sentence being carried into execution according to law.

Sessions Judge.

Dated the *day of* .

DEATH WARRANT.

To

Jailor of .

WHEREAS on the day of
the month of in the year 187
son of
of Village
Pergunnah
in the District of
was convicted before me*
of the offence of†
and sentenced to suffer death by being hanged by the neck until he is dead; and whereas the said sentence has been duly confirmed by order of the High Court of Judicature:—

It is hereby ordered that execution of the said sentence be made and done upon the said
on the of the month of
or so soon thereafter as may be.

You are hereby required to receive the said
into your custody in the said Jail of
together with this warrant, and there carry the aforesaid sentence into execution according to law.

Sessions Judge.

Dated the *day of*

WARRANT FOR LEVY OF FINE.

To the Magistrate of the District of and all other Magistrates and Police Officers within the Sessions Division of .

WHEREAS
son of
of Village
Pergunnah
in the District of
was convicted before me*
of the offence of†
and sentenced to pay a fine of

You are hereby required and directed to levy the amount of the said fine by distress and sale of any moveable property belonging to the said

Sessions Judge.

Dated the *day of* .

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* Name and official designation (specifying powers in case of Magistrate).
† Mention the offence, quoting also Act and section.
‡ State the punishment fully and distinctly, mentioning its nature and extent.

* Name and official designation.
† Mention the offence, quoting also Act and section.

Circulates Letter regarding the refund of examination-fees realized from candidates for enrolment as Pleaders and Mookhtears.

Letter No. 828, from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to the Accountant-General of Bengal, dated the 27th March 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

SIR,—I am directed to acknowledge the receipt of your letter No. 14421, dated the 8th instant (with enclosure), inquiring whether examination-fees realized from candidates for "enrolment as Pleaders and Mookhtears" may be refunded when the candidates are not examined.

2. I am to observe in reply that the Rules of the 2nd May 1866 do not provide for the return of fees in any case, and in the Court's opinion, no such provision is called for.

CIVIL CIRCULAR MEMO. No. 4.

(CIVIL SIDE.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

FORWARDED to all District Judges and Judicial Commissioners for information and guidance.

Directs the discontinuance of the detailed registers of fines in the vernacular.

CRIMINAL CIRCULAR ORDER No. 6.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Sessions Judges and Magistrates, dated the 27th March 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

THE Court is pleased to order the discontinuance of the detailed registers of fines in the vernacular, enjoined by Circular Order No. 14, dated 16th December 1867, para. 2.

District Judges and Judicial Commissioners to submit returns regarding the duties performed by, the cost of, and realization of fees by, Civil Court Ameens.

CIRCULAR MEMO. No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District Judges and Judicial Commissioners, dated the 21st April 1873.

(CIVIL SIDE.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

All District Judges and Judicial Commissioners

ARE requested to submit, in the forms appended, three returns for each District,

two of the inquiries made or duties performed by each Civil Court Ameen in the past year, distinguishing the permanent from the extra or "ticca" men, and the other, of the cost of employing those officers, and the fees realized through their agency.

The above returns are required urgently.

1872. *District of* *Work of* *Civil Court Ameens.*

No. of Case, and Value of Claim.	Nature of Inquiry ordered.	Court of the	Date of Order.	Date of Return.	Time actually occupied.	Cost of Inquiry, including Travelling Allowance of Ameen.	REMARKS.

1872. *District of* *Work of* *Extra or Ticca Ameens.*

No. of Case, and Value of Claim.	Nature of Inquiry ordered.	Amount of Payment.	Time occupied.	REMARKS.

1872. *Cost of Employment of Civil Court Ameens (permanent and extra), and Fees realized through their Agency.*

No. and Grade of Ameens.	Disbursements on account of employment of Ameens.	Fees realized through their agency.	Surplus.	Deficiency.

Instructions as to preparation of Quarterly Statement D, prescribed by Circular Order No. 31, dated 4th November 1870.

CIRCULAR ORDER No. 7.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Sessions Judges and Magistrates, dated the 10th April 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges.*

THE following instructions should be observed in the preparation of Quarterly Statement D, prescribed by Circular Order No. 31, dated 4th November 1870 :—

1. The return has reference to judicial work alone, the High Court having no supervision of Police work in any shape. No person who has not appeared personally or by agent in the Magistrate's Court is to be included in the statement; but all persons who have appeared, whether in obedience to summons, warrant, or other process, or voluntarily, to answer a criminal charge, should be entered in column 3, *Number of persons under trial during quarter.*

2. Column 4, *Discharged without trial,* will contain only persons whose discharge under sections 197 and 215, Act X. of 1872, is not an acquittal.

3. Column 5, *Acquitted*, will contain absolute acquittals, such as under sections 211 and 220; and also the cases of persons, in respect of whom the dismissal of a complaint, under section 208, operates, by section 212, as an acquittal; and persons who having appeared to answer complaints withdrawn under section 210, are thereupon discharged, as such complaints cannot again be entertained.

4. Columns 6 and 7 admit of no mistake, and call for no explanations.

5. All persons discharged from bail taken under section 125 without appearing before a Magistrate will cease to appear in these returns.

Circular Order No. 14 of the 21st May 1862 of late Sudder Court re-called. High Court reserves to itself power of calling for explanations regarding the issue of warrants or summons by Magistrates.

CIRCULAR ORDER No. 8.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Sessions Judges and Magistrates, dated the 19th May 1873.

(CRIMINAL SIDE.)

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges*.

THE late Sudder Court's Circular of the 21st May 1862, No. 14 (or No. 98 of the published series), is hereby re-called.

2. The High Court reserves to itself the power of calling for explanations whenever the returns exhibit results which appear to show want of circumspection in the issue of warrant or summons by Magistrates.

3. This order will not absolve the Magistrate of the District from the duty of maintaining a watchful and intelligent control over the proceedings of his subordinates in this respect.

Book Circular No. III.—153 of the Chief Court, respecting decrees made in certain cases giving oppressive rates of interest, published for the consideration of all Civil Courts in the Lower Provinces.

CIRCULAR ORDER No. 8.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Courts in the Lower Provinces, dated the 30th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, the Hon'ble F. A. Glover, and the Hon'ble W. Ainslie, *Judges*.

THE Court are pleased to publish and commend, to the earnest consideration of Judicial Officers, the following Circular issued by the Chief Court of the Punjab.

2. Many cases have come to the knowledge of the Court in which interest has been

decreed at the most oppressive rates without regard to the circumstances under which the loan was contracted.

3. The Courts in this way become instruments for the registering of usurious transactions, and the money-lender adds to exorbitant terms the security of a decree.

4. The object of the Court in drawing attention to this subject is not to assist debtors in evading the consequences of engagements voluntarily and intelligently contracted, but to give the protection of the Courts of Justice to persons who, from distress, ignorance, or habits of submission, have not been truly free agents in the contracts set up.

5. Particular attention is directed to the last paragraph of the Punjab Circular.

(Sd.) W. M. SOUTTAR,
Officiating Registrar.

BOOK CIRCULAR No. III.—153.

From E. H. HARRISON, ESQ., *Officiating Registrar, Chief Court, Punjab, to all Commissioners and Deputy Commissioners in the Punjab, dated Lahore, the 18th January 1873.*

Present:

C. Boulnois, Esq., C. R. Lindsay, Esq., and J. S. Campbell, Esq., *Judges.*

1. THE Chief Court has reason to believe that in many of the Courts of this province, especially in those of the agricultural districts, decrees are frequently made by which interest upon debts incurred by peasant proprietors and cultivators is declared payable at exorbitant rates.

2. Cases in which the village money-lender sues his customer involve ordinarily small amounts below Rs. 500, and, therefore, can scarcely ever come before the Chief Court in consequence of the provisions of Act XXIII. of 1861, section 27, which declares that no special appeal shall lie in cases of the nature cognizable in Small Cause Courts.

3. The Chief Court has, in fact, had no opportunity of explaining in a judicial decision the general principles which govern this question; while in many parts of the country the subordinate Courts, and especially the Small Cause Courts, have (as it appears from a recent inspection of records) decreed interest in a manner far too indiscriminate.

4. The Chief Court regards this with great regret, and considers that the law, as it really stands, requires some explanation for the guidance of Judicial Officers, in order that it may not be misunderstood to the detriment of debtors of the class above referred to.

5. The second section of Act XXVIII. of 1855 (*an Act for the repeal of the usury laws*) declares that, "in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate, if any, agreed upon by the parties;" and all due effect must doubtless be given to these words, taken in their plain and ordinary meaning, without any artificial construction being placed upon them for any purpose whatever.

6. The above legislative enactment was formerly enforced in many cases that arose in this province, subject to the qualification declared in paragraph IV., section 19 of the Principles of Law, commonly called the Punjab Civil Code, which contained the following: "The Courts are not bound by any restrictions with regard to usury. Debtors and creditors are allowed to arrange the terms and conditions of interest in whatever manner they may deem most conducive to their mutual benefit; the Courts will decree whatever rate may have been agreed upon *bonâ fide* between the parties. If no special rate shall have been agreed upon, then the Court will fix what may appear an equitable amount with reference to the custom of the locality, the usage of trade, or the merits of the transaction. It will be remembered that the rates of interest vary for different classes and in different places."

* * * * * *

"The debtor need not be compelled by the Court to pay the entire amount of interest, if there be reason to believe that the bond was executed through fear or ignorance."

7. The compilation from which these words are taken has no force of law in itself, but the general law of contract is, equally with those words, against our Courts considering themselves absolved from the responsibility of regarding the circumstances under which an engagement to pay exorbitant interest has been entered into; and omission by the Courts to give due weight to such circumstances is likely to give rise to serious injustice, and to such evils as are discussed in the Minute on interest by Mr. Melvill, which has been recently circulated among Judicial Officers of the province.

8. The Indian Contract Act of 1872, in Chapter II., gives the principles on which the law annexes an enforceable obligation to stated engagements requiring free consent; and, in sections 16 and 17, a general and, at the same time, an equitable rule is indicated where a person who holds a real or apparent authority over another, or in whom confidence is reposed by that other, obtains an advantage which, but for such confidence or authority, he would not have obtained. The law also points out the result where concealment of facts may have taken place, or acts fitted to deceive, or acts or omissions may have occurred in violation of what is regarded as the legal duty of the person obtaining a promise from another to explain facts "*likely to affect the willingness*" of that other to enter into a contract.

9. Reference may also be made to section 6 of Act IV. of 1872 (the Punjab Laws Act), where it is declared that justice, equity, and good conscience shall be the rule of decision, and it may be safely affirmed that the equity governing this matter is to give their true and full effect to the words of the Indian Contract Act.

10. The repeal of the usury laws by Act XXVIII. of 1855, and the abolition of any force of law which the paragraph above quoted from the so-called Punjab Civil Code may have had before the passing of Act IV. of 1872, have left untouched the doctrines of equity, both as to the protection of debtors who for any real reason are not fully competent to protect themselves, and as to the power of Courts to relieve against what are called unconscionable bargains with such persons.

11. No doubt any one who contracts with another is entitled to assume, *primâ facie*, that the latter is competent to look after his own interests, but no strict rule defines or can define where comparative incapacity ceases, and where extreme ignorance and

helplessness call for the protection of the equitable rules prescribed by law.

12. No doubt also, as a general rule, the debtor is bound to go or send to his creditor, and pay him. In many contracts, however, for the loan of grain for a particular sowing (which indeed may reasonably be for the return of grain after the harvest at a very high rate of interest), where the cultivator fails to make payment after the harvest, a distinction may clearly be taken. Neither party originally contemplates a rate of interest intended only for a particular period, running on from the time of the transaction indefinitely, and in such cases the real intention of the parties with due regard to the position of the cultivator must be considered.

13. The existence of undue influence may, in many cases, be inferred (according to the general rules of equity jurisprudence) from the extreme imprudence of the act done, when coupled with other circumstances; and in this country the relations existing between the professional money-lender and indebted peasant are such that this rule should be borne in mind by our Courts.

14. In no case should exorbitant interest be decreed in favor of a money-lender suing a peasant proprietor or cultivator, or any person similarly situated (where the right to recover it is disputed), unless the Court trying the case is satisfied that the stated engagement on which the plaintiff seeks to recover has been entered into by the debtor with knowledge of all the circumstances attending his position, and his liability in regard to his creditor, and of his entire free will, without inequitable pressure of any kind. The Courts may consider whether or not the contract was a prudent one—not with a view to setting it aside if imprudent, for that, of course, is entirely besides the Court's duty, but with a view to determining whether extreme imprudence, from which, along with other circumstances, the existence of undue influence might be inferred, has or has not been manifested. Reference on this point may be made to the custom of the locality, the usage of parties similarly situated, and the rates for loans prevailing, so that the character of the transaction may be tested.

The debtor need not be compelled by the Court to pay the entire amount of interest, whether agreed upon in cash or in grain, if there be reason to believe that the engagement, whether evidenced by bond, or by signing, or marking the money-lender's book, or completed in any other mode, has been entered into through fear, or ignorance; and if, in any case, the amount of interest shall appear to have been agreed upon under circumstances which would render the awarding it contrary to the principles above referred to, the Court will only decree as much interest as may appear just under the circumstances.

15. In conclusion, the Chief Court repeats the injunction conveyed in Book Circular XXIX. of 1867, that, in awarding interest subsequent to the date of the decree, the Courts should not allow it to approach in amount that which may be obtainable by persons who have not the security of a decree, and that no inducement should be afforded to decree-holders to allow their decrees to remain unexecuted. Further, the Courts are reminded that, where a large portion of the amount decreed consists of interest, it is not compulsory on them to decree interest upon the amount decreed, inasmuch as the Courts may fully exercise the discretion allowed them by Act XXIII. of 1861, section 10, and not award any such interest at all.

REVENUE CIRCULARS.

JANUARY 1873.

THE HON'BLE V. H. SCHALCH.

Addition to Rule 12, Section V., Chapter VI., page 121, of Board's Rules regarding security-bonds.

No. 1.

THE following is added as Rule 12, Section V., Chapter VI., page 121, Board's Rules:—

"Security-bonds given on plain paper by ministerial officers are exempted from payment of registration fees."

The additional compensation of 15 per cent. should always be paid when land is taken for public purposes under Act X. of 1870, except in cases of special agreement.

No. 2.

THE Board have noticed the existence of a common impression among local officers that, when parties interested in land to be taken up under Act X. of 1870 make no demur to the acquisition, or any distinct claim to the additional compensation authorized under section 42, such acquisition should not be considered compulsory, and therefore no additional compensation should be awarded.

2. The Member in charge desires to impress upon all officers engaged in land acquisition proceedings that it is a presumption of law, and not of fact, that the surrender of land acquired under Act X. of 1870 is compulsory. The additional compensation of 15 per cent. should, therefore, be paid in all cases, except where under special agreement the parties have accepted a lump sum, and distinctly waived or included therein the claim to any additional compensation under section 42. In all such cases the agreement must be taken in writing, and filed with the proceedings.

Alterations in Section VII., Chapter VI., Board's Rules, regarding leave rules and absentee allowances.

No. 3.

THE following alterations are made in Section VII., Chapter VI., Board's Rules:—

Clause 1.—Substitute for this Clause "The "Covenanted and Uncovenanted Absentee "Regulations are contained in 'the Civil "Leave Code,' being the Notification of the "Government of India, Financial Depart-"ment, No. 2008, dated 14th March 1872, "with subsequent amendments published "under the same authority."

Clause 5.—For the words "The Government of India have authorized the grant of half-pay to peons," substitute "Half-pay is allowed to peons," and strike out from the words "and the Government of Bengal" to the end of the clause.

Clause 6, para. 1.—For the words "under section 11 ..... April 1864," substitute "section 3, Supplement F of the Civil Leave Code."

Clause 6, para. 2.—For the words "under section 12 ..... April 1864," substitute "sections 5 and 7, Supplement F of the Code."

Clause 7.—This clause is cancelled, the form prescribed in it being superseded by that given in section 15 (*b.*1), Supplement F of the Code.

New rule added to instructions regarding the administration of Act X. of 1870.

No. 4.

THE following is added as para. 17A of the Instructions for the administration of Act X. of 1870:—

17A.—In all cases referred to the Court under section 15, the Government Pleader should, under section 23, be instructed to appear and state the cause on the part of Government to the Court.

A. MONEY, ESQ., C.B.

Alteration in Board's Rules, clause 3, para. 7, page 114, admitting Inspectors of Police to share in special rewards granted in cases non-realization of fines under the Excise & Opium Laws.

No. 5.

IT appears desirable that Inspectors Police should share in the special rewa granted by the Board of Revenue in ca of non-realization of fines imposed under Excise and Opium Laws. The followi alteration is, therefore, made in the Boar Rules :—

Clause 3 of para. 7 at page 114.

For "Sub-Inspector" substitute "Inspector.

Provides against the insufficiency of stamps Sub-divisions and Moonsiffees.

No. 6.

SOME officers have represented that there is a difficulty in giving full effect, at Sub-Divisions and Moonsiffees, to the order contained in the Government Notification of 1 July* last, issued under section 27 of Ac VII. of 1870 (the Court Fees Act), which rules that, when a single stamp can be used as the exact stamp required to denote a fee, it should be so used, unless the Collector certifies that no such single stamp is in stock. The Member in charge desires, therefore, that all District Officers will impress on stamp-vendors the necessity of taking for sale a sufficient stock of stamps of the higher values required in suits in Moonsiffs' Courts, and to warn them that, if they do not keep up a proper stock of Court-fees' stamps to meet the public demand, it will be necessary to cancel their licenses.

* *Vide* page 2 of the *Calcutta Gazette*, dated 3rd July 1872.

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THE HON'BLE V. H. SCHALCH.

The Towjih Statement is not intended to supersede Return No. X., and need not be employed unless found useful.

No. 1.

As it appears from several communications received in this Office that the object of the Towjih Statement, recently circulated, has been misunderstood by several Revenue Officers, Collectors are informed that this Statement is not intended to supersede Return No. X., but to facilitate the preparation of it. It need not be employed at all unless it is found useful.

A. MONEY, ESQ., C.B.

Lays down amended Rules regarding the payment of rewards in cases where fines are not at once realized under the Opium Laws.

No. 2.

To secure the immediate payment of rewards in cases where fines are not at once realized from offenders against the Opium Laws, the Government has now authorized the Magistrate of every District to pay to informers and apprehenders in such cases the rewards adjudged, up to the amount of Rs. 100, from the public funds, as soon as the case has been decided. Should payment of any larger reward appear called for, reference should be made by the Magistrate to the Opium Agent. The present Rule 5 F, section XVIII., Chapter V., page 81, Board's Rules, is therefore cancelled, and the following amended rules are substituted :—

5F. When fines, &c., are not immediately realized, the Magistrate is authorized to disburse at once rewards up to the amount of Rs. 100, taking the payee's receipt, and disposing of the receipted bill as provided for in the preceding rule.

5G. Where a larger reward than Rs. 100 is adjudged, the Magistrate should apply to the Opium Agent for authority to make the payment, with a full statement of the circumstances of the case and of his reasons for recommending a reward of more than Rs. 100, together with a bill for the amount proposed to be disbursed, drawn up in the prescribed form. On receiving the Agent's sanction, with the bill duly countersigned, the Magistrate should pay the amount, and forward the bill to the Accountant-General as a voucher, duly receipted by the payee.

5H. The Magistrate should submit to the Agent a monthly statement of all rewards paid under his direct order, sending up at the same time, when available,—that is, when not wanted for an appeal,—the records of the case, so that the latter may make the regular necessary adjustment against the Budget grant for the year, and keep the expenditure within the fixed limits. When the records cannot be sent, a short report, with the reasons for the amount of reward given, should be forwarded.

A. MONEY, ESQ., C.B.

Addition to Rule XL. of the Salt Manual.

No. 3.

FROM the reports received on the working of Circular Order No. 10 of June 1872, in the districts within the Saliferous Tracts, it appears that generally the orders then issued have worked well. To render the new rule more completely successful, the following addition is now made to Rule XL. of the Salt Manual: "A register, showing the sales of salt by each wholesale and retail trader, in each month, should be kept by the Sub-Divisional Officer in the following form:"—

Month.	Name of Vendor and Locality.	Wholesale Sale.	Retail Sale.

District Officers to warn the Police as t duties and responsibilities in the of checking dealings in illicit spirits.

No. 4.

THE attention of the Member in c has lately been drawn to the marked in tion of the Police, in certain cases, to duty in checking dealings in illicit s The District Officers, who are no direct heads of the Police, should measures to stop effectually this negl duty. Where these illicit dealings p to any extent, the Police can scarcely re in ignorance, and silence on their part generally arise from their connivance i offence.

2. Under the sudder distillery sy there is great temptation to illicit distillat and the interests of every seller and sumer of liquor are opposed to those Government. Any money spent in purch ing the pretended ignorance of those w duty it is to detect and prevent illicit di lation, is money profitably laid out by illicit distiller. Under these circumstance is impossible to secure due watchfulness attention on the part of the Police, unless t feel that where the absence of these may reasonably inferred punishment will follo

3. If, therefore, the Police are m clearly to understand that whenever existence of illicit distillation is discove through other agency than theirs, they be put on their defence for neglect, and t punishment will follow unless they can c themselves, a stronger blow will be struck this system of fraud upon the revenue th in any other way. The Member in cha trusts that each District Officer will m every Inspector and Sub-Inspector answ able that illicit distillation does not go within his beat; whilst at the same time t authority given by the law to award ha some rewards to informers and apprehende should be always liberally exercised.

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MARCH 1873.

THE HON'BLE V. H. SCHALCH.

Land Acquisition Act X. of 1870.

No. 1.

To the heading of Column 8, Appendix F of the Instructions for the administration of Act X. of 1870, add—"or Court if the case be referred to the Court."

Returns of Sale-proceeds of the produce of Government lands.

No. 2.

DISTRICT OFFICERS are informed that, in future, the items noted in the margin should be excluded from Table V. of Return No. X.

Sale proceeds of the produce of Government lands, not being lands declared by Government to be "Forest Tracts."

A. MONEY, ESQ., C.B.

Embezzlement of Stamps.

No. 3.

IN a case of serious embezzlement of stamps at a district sub-division recently brought to notice, it appeared that, for some months, the state of affairs at the sub-division was unknown at head-quarters. The treasury officer at the sudder station had repeatedly, but in vain, endeavoured, by direct correspondence, to obtain proper accounts from the officer in charge of the sub-division. Had he applied to the Collector as he should have done, for the exercise of his authority over the sub-divisional officer, a proper check over proceedings might have been at once enforced.

2. The Member in charge fears that, in many districts, the lax system prevails of putting a Deputy Collector in almost uncontrolled charge of the treasury; it is often difficult for such a subordinate officer to get a covenanted sub-divisional assistant to comply quickly with his direct requisitions. Commissioners are now requested to impress upon every district officer his personal responsibility for the proper working of every department under him. It is believed that very commonly Collectors do not look into treasury work at all; and Collectors should exercise such supervision as would ensure the regular and prompt despatch of all kinds of business connected with the treasury.

APRIL 1873.

THE HON'BLE V. H. SCHALCH.

Table E5, Return XLI., "Register of Transfer," to show the transfers made during the year to which the return refers.

No. 1.

DISTRICT OFFICERS are informed that Table E5, Return XLI., "Register of Transfer," should show transfers made during the year to which the return refers, and those only.

Land Acquisition Instructions—Temporary Agreements.

No. 2.

THE following is substituted for paragraph 16A of the Land Acquisition Instructions:—

"Whenever the proprietor of any land, covered by a declaration, may offer to give up his land to Government without compensation, whether on condition that such land shall be restored to him when no longer

required for the purpose specified in the declaration or otherwise, the Collector should, for the purpose of securing the title of Government, carry out in full the procedure required by the Act ; and in case no adverse claim is made to the land, award a sum of one rupee as nominal compensation for the land. Whenever any condition is attached by the proprietor to the gift of the land, the circumstances should be reported to the Board for orders ; and should the Collector be empowered to accept the condition, a clause should be inserted in the award pledging the Government to give effect to it."

Further Rule added to Rules at page 211, regarding estimates of requirements from the Record Grant.

No. 3.

To avoid mistakes, which are sometimes made in including in estimates of requirements from the Record Grant items which are not properly debitable to the Grant, the following rules are added as clauses 1E, 1F, and 1G, section VI., at page 211 of the Board's Rules :—

1E. The following items may be included in the estimates :—

Almirahs,
Racks,
Oil,
Tar,
Cloth,
Planks,
Repairs to furniture,

and also generally whatever petty stores, not being such as are properly procurable from the Stationery Office, are required for special use in the record-room, as distinguished from all other branches of the office.

1F. The cost of establishments for binding books kept in the record-room, for sorting, arranging, and destroying records, and for re-copying revenue records, other than those belonging to the Survey Department, may be debited to the Grant.

1G. The cost of copying survey maps and records is not debitable to the Grant nor is that of re-writing the general and Pergunnah Registers of Estates (A, B, and C). Articles procurable from the Stationery Office should not be charged to the Grant, nor should petty stores, such as those enumerated in clause 11, page 310, Board's Rules unless they are required for use in the record room.

Alterations in Board's Rules at pages 357 and 222.

No. 4.

In clause 7, section 7, at page 357, Board's Rules, after the words "these rules" add "where the commutation-money is paid up at once in full." At the end of the clause add—"In cases where the commutation money and interest are paid in instalments the report is to be made in the form of an extract from Register No. 46A."

The following should be inserted at page 222 of the Board's Rules :—

Register (No. 46A) of commutations of existing grants. 2.—Number and date of existing grants. 3.—Number of the application in Register No. 40. 4.—Pergunnah thannah, or sub-division in which situated 5.—Village or township. 6.—Area and boundaries of the plot as ascertained by survey. 7.—Date of commutation. 8.—Name and residence of purchaser. 9.—Date of possession being given. 10.—Amount paid for survey and advertisement. 11.—Price for which commuted. 12.—Dates of instalments of the prices being paid with amounts. (*N.B.*—Interest-payments not to be shown here.) 13.—Date and amount of interest-payments and period to which they refer. 14.—Date on which the title becomes absolute by payment of the purchase-money in full.

Erratum.

Circular Order No. 1, for April 1873, for "Return No. 41" read "Return No. 41B."

Instructions to Officers engaged in Land-revenue Settlements.

No. 5.

UNDER instructions from Government, the Member in charge requests that Officers engaged in land-revenue settlements will, in future, record, in *local beeghas* and in acres, in two columns, the areas of the estates which are being settled, and note whether the beegha on which the settlement rates are fixed is the beegha previously used; and if not, what the difference between that used in the previous and that in the proposed settlements may be. This record should be made under the 7th heading of the Settlement Report Form No. 19, page 302 of the Board's Rules.

Amendment of Board's Rules, cl. 6, p. 125.

No. 6.

AFTER line 3, in clause 6, page 125 of the Board's Rules, insert "or at a more rapid rate than three miles an hour;" and after "mile," in line 5, insert "provided the actual expenses incurred by them, and no more, are drawn."

For the last two lines of the clause substitute—

"in the following form:—Certified that the exigencies of the public service required that the above Officers should be directed to proceed by dâk, or at a more rapid rate than three miles an hour, and that no more than actual expenses have been charged."

Instructions to District Officers regarding Return XXXI., Table VI., heading XII., Miscellaneous.

No. 7.

IN submitting Return No. XXXI., District Officers will, in future, invariably explain fully, with reference to the entries in Table VI. under heading "XII., Miscellaneous," how much money has been spent on improvements, or on objects by which the estates concerned will, from the point of view either of the proprietor or of the people, benefit either financially or otherwise.

Alterations in the Form of Table III., Return No. X.

No. 8.

THE following alterations have been made in the form of Table III., Return No. X.—

For the headings in column 1, substitute the following:—

(*a.*) Permanently-settled estates paying more than Rs. 100 ... ...

(*b.*) Ditto ditto, Rs. 100 and less ...

(*c.*) Estates the property of individuals, temporarily settled or farmed ... ...

(*d.*) Ditto ditto held under direct management ... ...

(*e.*) Government estates under farming leases ... ...

(*f.*) Ditto ditto under direct management.

Total ... ...

(*g.*) Estates under the Court of Wards, included in the above ... ...

(*h.*) Estates attached by order of the judicial authorities, and included in the above.

N.B.—It must not be overlooked that, under present rules, all Government estates settled for terms of years pass out of the category of Government estates, and become the property of the settlement-holders, except where it is especially stipulated that

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the settlement-holder has no right to re-settlement, in which case the settlement is a farm.

The Superintendent of Stationery will be directed to print the new forms immediately, and also to issue separate slips for Table No. III., which can be pasted on to the forms at present in stock in the district offices, with a view to avoid delay in the submission of the returns for the first quarter of the current year, which must be prepared in the form now prescribed.

Addition to Board's Rules, cl. 24A, s. III., p. 276.

No. 9.

THE following should be added as clause 24A, section III., page 276, Board's Rules:—

"The rule in the last clause must be read in connection with the orders of Government, contained in paragraph 20 of Resolution, dated 22nd April 1873, that, where the settlement operations in any one district do not extend over an area of more than 2,000 acres in the course of one and the same official year, they must be carried out by regular subordinate establishments constituted under that Resolution."

MAY 1873.

THE HON'BLE V. H. SCHALCH.

Instructions regarding the Disposal of all Lands along the Sides of Roads.

No. 1.

IT has been decided by Government that all lands along the sides of roads, which are not permanently required for the use of the roads, are to be made over once for all to the Revenue Department for disposal. The same course is to be followed in the case of roads in the Magistrate's charge. But where the lands are still required for road purposes, but are *temporarily* available for settlement by the Collector, they are to be made over to him in trust for the department to which they belong; and when they are settled, the revenue is first to be credited to Land Revenue, and then transferred to credit of the department to which the lands belong.

Instructions to Officers employed in taking Lands under Act X. of 1870.

No. 2.

LOCAL OFFICERS who are, or are liable to be employed in taking up lands under Act X. of 1870 are informed that, as plots of land similar to those to be acquired change hands from time to time, and records of many, not all, of these transactions are to be found in the several Registrars' Offices, they should test their own valuations of the lands which they may be engaged in taking up by a careful examination of the registration record whenever this source of information may be available.

Addition to Government Orders, para. 9, Land Acquisition Act.

No. 3.

THE following is added under the orders of Government to para. 9 of the Land Acquisition Instructions:—

"But in all cases the Collector must verify his information by inquiry on the spot, and must attach a certificate to his estimate of value, to the effect that 'the rates have been arrived at after local inquiry and inspection of the ground.'"

These inquiries can now be made through the agency of the Subordinate Executive Establishments recently appointed by Government.

Directions as to the Filling-up of Table II. of Return No. XVI.

No. 4.

As there has been a want of uniformity in filling-up Table II. of Return No. XVI., it is hereby notified, in supersession of all previous orders separately issued from time to time to District Officers, that columns 4 and 5 against headings 3 and 7 should invariably be left blank. Columns 6 and 7 against those headings will, however, show the differences between headings 1 and 2 and 5 and 6, respectively.

If there be no figures against headings 3 and 6, the figures against headings 1 and 5 respectively, should, of course, be brought down.

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